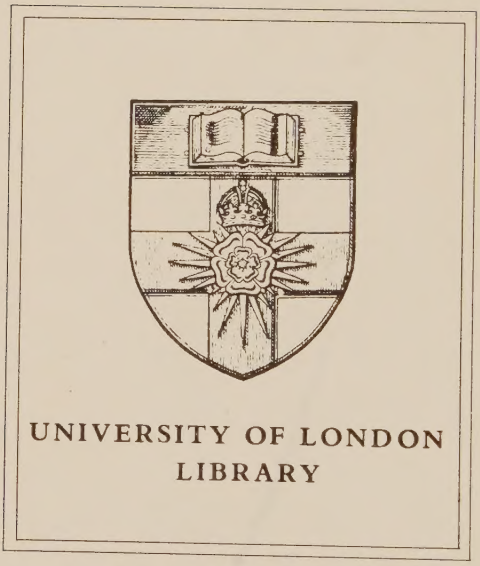
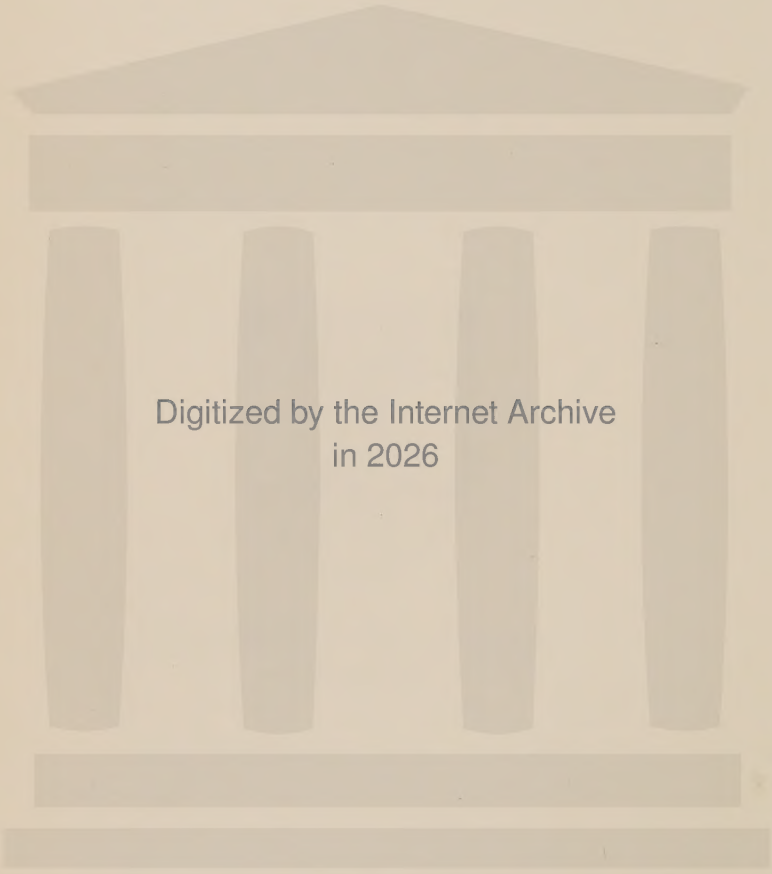
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 Mx. NorL.




Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1914_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir J. A. Simon, K.C.V.O., M.P.	Attorney-General.
Sir S. O. Buckmaster, M.P.	Solicitor-General.
Walter Trower, Esq., President of the Law Society.	

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C.	Lincoln's Inn.
A. R. Kirby, Esq.	
Sir F. A. Bosanquet, K.C.	Inner Temple.
H. F. Dickens, Esq., K.C.	
C. C. Scott, Esq., K.C.	Middle Temple.
W. F. Hamilton, Esq., K.C.	
J. C. Lewis Coward, Esq., K.C.	Gray's Inn.
H. E. Duke, Esq., K.C., M.P.	
Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
E. W. Hansell, Esq., of the Inner Temple	
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.).	The Law Society.
J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1914.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. J. BROOKS, W. F. BARRY,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, W. H. GRIFFITH, J. H. WILLIAMS, J. S. HENDERSON,	*Barristers-at-Law.*
Bankruptcy Cases	H. L. FRASER,	*Barrister-at-Law.*

1914.—VOL. I.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1914.

Viscount HALDANE, Lord Chancellor.

Lord READING, Lord Chief Justice of England.

Sir H. H. COZENS-HARDY, Master of the Rolls.

Sir ROLAND VAUGHAN WILLIAMS,
Sir H. B. BUCKLEY,
Sir W. R. KENNEDY,
Sir J. A. HAMILTON (1),
Sir C. SWINFEN EADY,
Sir W. G. F. PHILLIMORE,
} Lords Justices of the Court of Appeal.

Sir SAMUEL T. EVANS, } President of the Probate, Divorce and Admiralty Division.

(1) Now Lord Sumner.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1914.

Lord Reading, Lord Chief Justice of England, President.
Sir Edward Ridley, Knt.
Sir Charles John Darling, Knt.
Sir Arthur Moseley Channell, Knt.
Sir Reginald More Bray, Knt.
Sir Alfred Tristram Lawrence, Knt.
Sir William Pickford, Knt.
Lord Coleridge.
Sir Thomas Edward Scrutton, Knt.
Sir John Eldon Bankes, Knt.
Sir Horace Edmund Avory, Knt.
Sir Thomas Gardner Horridge, Knt.
Sir Charles Montague Lush, Knt.
Sir Sidney Arthur Taylor Rowlatt, Knt.
Sir Clement Meacher Bailhache, Knt.
Sir James Richard Atkin, Knt.

ATTORNEY-GENERAL:

Sir J. A. Simon, Knt.

SOLICITOR-GENERAL:

Sir S. O. Buckmaster, Knt.

ERRATUM.

Page	*Line*	*For*	*Read*
121	footnote (1)	10 Ir. R. C. L.	Ir. R. 10 C. L.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1914, will be as follows:—

In the First Series,
[1914] 1 Ch. [1914] 2 Ch.

In the Second Series,
[1914] 1 K. B. [1914] 2 K. B. [1914] 3 K. B. [1914] P.

In the Third Series,
[1914] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Agar, Atkins *v.*	26
Allen *v.* Inland Revenue Commissioners	327
Anglo-American Oil Company *v.* Port of London Authority	14
Appleyard *v.* Bangham	258
Arlidge, Ex parte. Rex *v.* Local Government Board (C. A.)	160
Arnold *v.* Jeffreys	512
Asiatic Petroleum Company *v.* Lennard's Carrying Company (C. A.)	419
Atkins *v.* Agar	26
Attorney-General *v.* Thynne	351
Avery, Metropolitan Water Board *v.* (C. A.)	221

B.

Bangham, Appleyard *v.*	258
Bee Hive Spinning Company, Owner *v.*	105
Belsize Motor Supply Company *v.* Cox	244
Berry *v.* Farrow	632
Beyer, Mawson Shipping Company *v.*	304
Boaler, In re	122
Brewery (City of London) Company, Furtado *v.*	152
———————— (C. A.)	709
Brewery (Usher's Wiltshire) *v.* Bruce	357
British Oil and Cake Mills *v.* Port of London Authority	5
Brixton Prison (Governor), Rex *v.* Ex parte Servini	77
Brooks *v.* Inland Revenue Commissioners (C. A.)	579
Bruce, Usher's Wiltshire Brewery *v.*	357
Buchanan, Inland Revenue Commissioners *v.*	339
Bunt *v.* Kent	207
Burrell & Sons *v.* F. Green & Co.	293
Byrne *v.* Statist Company	622

C.

Camden (Marquis) *v.* Inland Revenue Commissioners (C. A.)	641

PAGE

Carrying (Lennard's) Company, Asiatic Petroleum Company *v.* (C. A.) 419
Chainey, Rex *v.* (C. C. A.) 137
Churchill & Sim, Gabriel (Thomas) & Sons *v.* 449
City of London Brewery Company, Furtado *v.* 152
——————— (C. A.) 709
Clamp & Son, MacGregor *v.* 288
Clay, Inland Revenue Commissioners *v.* 339
Coal (Glamorgan) Company, Davies *v.* (C. A.) 674
Cooper *v.* Swift 253
Cox, Belsize Motor Supply Company *v.* 244
Crowe, Vickerman *v.* 462

D.

Darley, Mash *v.* 1
Davies *v.* Glamorgan Coal Company (C. A.) 674
Discount (London and Provinces) Company *v.* Jones 147

E.

Ellis, Vacuum Oil Company *v.* (C. A.) 693
Estates (Southend-on-Sea) Company *v.* Inland Revenue Commissioners (C. A.) 515
Evans, Nicholls *v.* 118

F.

Farrow, Berry *v.* 632
Forsbacka Jernverks Aktiebolag, Okura & Co. *v.* (C. A.) 715
Furtado *v.* City of London Brewery Company 152
——————— (C. A.) 709

G.

PAGE

Gabriel (Thomas) & Sons *v.* Churchill & Sim 449
George *v.* James 278
Glamorgan Coal Company, Davies *v.* (C. A.) 674
Gosden, Williams *v.* 35
Great Western Railway Company, Wills *v.* 263
Green (F.) & Co., Burrell & Sons *v.* 293
Grimble & Co. *v.* Preston 270

H.

Hale *v.* Morris & Sons 313
Hammond Brothers and Champness *v.* Jackson 241
Hankins, London County Council *v.* 490
Hayllar *v.* Inland Revenue Commissioners (C. A.) 528
Hendon Urban Council, Postmaster-General *v.* (C. A.) 564
Higgs & Hill *v.* Stepney Borough Council 505
Holmes *v.* Pipers 57
Huish *v.* Liverpool Justices 109

I.

Ingram & Royle *v.* Services Maritimes du Tréport (C. A.) 541
Inland Revenue Commissioners, Allen *v.* 327
———, Brooks *v.* (C. A.) 579
——— *v.* Buchanan 339
———, Camden (Marquis) *v.* (C. A.) 641
——— *v.* Clay 339

PAGE

Inland Revenue Commissioners, Hayllar *v.* (C. A.) 528

———, Shawe Storey *v.* 87

———, Southend-on-Sea Estates Company *v.* (C. A.) 515

J.

Jackson, Hammond Brothers and Champness *v.* 241

———, Oakey *v.* 216

James, George *v.* 278

Jeffreys, Arnold *v.* 512

Jones, London and Provinces Discount Company *v.* 147

K.

Kennard, Royal College of Veterinary Surgeons *v.* 92

Kent, Bunt *v.* 207

L.

Lambert *v.* Rowe 38

Lennard's Carrying Company, Asiatic Petroleum Company *v.* (C. A.) 419

Liverpool Justices, Huish *v.* 109

Local Government Board, Rex *v.* Ex parte Arlidge (C. A.) 160

London and Provinces Discount Company *v.* Jones 147

London County Council *v.* Hankins 490

Lowden, Rex *v.* (C. C. A) 144

M.

MacGregor *v.* Clamp & Son 288

McSherry, Wills & Sons *v.* 616

Marten, Stott (Baltic) Steamers *v.* 442

Mash *v.* Darley 1

Mawson Shipping Company *v.* Beyer 304

PAGE

Metropolitan Water Board *v.* Avery (C. A.) 221

Monckton *v.* Pathé Frères Pathephone (C. A.) 395

Morris & Sons, Hale *v.* 313

Motor Supply (Belsize) Company *v.* Cox 244

N.

Nicholls *v.* Evans 118

North *v.* Wood 629

O.

Oakey *v.* Jackson 216

O'Hare, Ex parte. Rex *v.* Thomas 32

Oil (Anglo-American) Company *v.* Port of London Authority 14

Oil (Vacuum) Company *v.* Ellis (C. A.) 693

Oil and Cake (British) Mills *v.* Port of London Authority 5

Okura & Co. *v.* Forsbacka Jernverks Aktiebolag (C. A.) 715

Owner *v.* Bee Hive Spinning Company 105

P.

Pathé Frères Pathephone, Monckton *v.* (C. A.) 395

Pathephone (Pathé Frères), Monckton *v.* (C. A.) 395

Petroleum (Asiatic) Company *v.* Lennard's Carrying Company (C. A.) 419

Phillips, Ex parte. Rex *v.* Williams 608

Pipers, Holmes *v.* 57

Port of London Authority, Anglo-American Oil Company *v.* 14

———, British Oil and Cake Mills *v.* 5

PAGE

Porter *v.* Tottenham Urban Council 663
Postmaster General *v.* Hendon Urban Council (C. A.) 564
Preston, Grimble & Co. *v.* 270

R.

Rex *v.* Brixton Prison (Governor). Ex parte Servini 77
—— *v.* Chainey (C. C. A.) 137
—— *v.* Local Government Board. Ex parte Arlidge (C. A.) 160
—— *v.* Lowden (C. C. A. 144
—— *v.* Roberts (C. A.) 369
—— *v.* Shellaker (C. C. A.) 414
—— *v.* Simpson 66
—— *v.* Thomas. Ex parte O'Hare 32
——, Wernham *v.* 468
—— *v.* Williams. Ex parte Phillips 608
Roberts, Rex *v.* (C. A.) 369
——, Tredegar (Lord) *v.* (C. A.) 283
Rowe, Lambert *v.* 38
Royal College of Veterinary Surgeons *v.* Kennard 92

S.

Services Maritimes du Tréport, Ingram & Royle *v.* (C. A.) 541
Servini, Ex parte. Rex *v.* Brixton Prison (Governor) 77
Shawe Storey *v.* Inland Revenue Commissioners 87
Shellaker, Rex *v.* (C. C. A.) 414
Shipping (Mawson) Company *v.* Beyer 304
Simpson, Rex *v.* 66
Smith (W. H.) & Son, Walters *v.* 595
Southend-on-Sea Estates Company *v.* Inland Revenue Commissioners (C. A.) 515

PAGE

Spinning (Bee Hive) Company, Owner *v.* 105
Statist Company, Byrne *v.* 622
Steamers Stott (Baltic) *v.* Marten 442
Stepney Borough Council, Higgs & Hill *v.* 505
Storey (Shawe) *v.* Inland Revenue Commissioners 87
Stott (Baltic) Steamers *v.* Marten 442
Swift, Cooper *v.* 253

T.

Terry, Webster *v.* 51
Thomas, Rex v. Ex parte O'Hare 32
Thynne, Attorney-General *v.* 351
Tottenham Urban Council, Porter *v.* 663
Tredegar (Lord) *v.* Roberts (C. A.) 283

U.

Usher's Wiltshire Brewery *v.* Bruce 357

V.

Vacuum Oil Company *v.* Ellis (C. A.) 693
Vickerman *v.* Crowe 462

W.

Walters *v.* W. H. Smith & Son 595
Water (Metropolitan) Board v. Avery (C. A.) 221
Webster *v.* Terry 51
Wernham *v.* Rex 468
Williams *v.* Gosden 35
——, Rex *v.* Ex parte Phillips 608
Wills *v.* Great Western Railway Company 263
—— & Sons *v.* McSherry 616
Wood, North *v.* 629

TABLE OF CASES CITED.

A.

		PAGE
Allen *v.* Wright	8 C. & P. 522	601
Appleby *v.* Myers	L. R. 2 C. P. 651	666
Arton, In re	[1896] 1 Q. B. 108, 509	79
Asiatic Petroleum Company *v.* Lennard's Carrying Company	[1914] 1 K. B. 419	548
Atkinson *v.* Warne	6 C. & P. 687	600
Attorney-General *v.* Brunning	8 H. L. C. 243	330
——— *v.* Churchill's Veterinary Sanatorium, Ld.	[1910] 2 Ch. 401	94
——— *v.* Gould	28 Beav. 485	649
——— *v.* Great Eastern Railway Company	5 App. Cas. 473	680
——— *v.* M'Lean	1 H. & C. 750	633
——— *v.* Mersey Railway Company	[1907] A. C. 415	680
——— *v.* Merthyr Tydvil Union	[1900] 1 Ch. 516	192
——— *v.* Nottingham Corporation	2 L. G. R. 698	171
——— *v.* Seccombe	[1911] 2 K. B. 688	517
Austin *v.* Olsen	L. R. 3 Q. B. 208; 37 L. J. (M.C.) 34	464

B.

Badeley *v.* Consolidated Bank	38 Ch. D. 238	697
Banshee, The	56 L. T. 725	169
Barnard Castle Urban Council *v.* Wilson	[1901] 2 Ch. 813; [1902] 2 Ch. 746	225
Barnes *v.* Brown	[1909] 1 K. B. 38	96
Batt *v.* Mattinson	64 J. P. 615	275
Bayly *v.* Went	51 L. T. 764	697
Beardsley *v.* Giddings	[1904] 1 K. B. 847	129
Beavan *v.* Oxford (Lord)	6 D. M. & G. 507	701
Beckwith *v.* Philby	6 B. & C. 635	601
Bellerby *v.* Heyworth	[1910] A. C. 377	94
Belper School Attendance Committee *v.* Bailey	9 Q. B. D. 259	210
Berney *v.* Sewell	1 Jac. & W. 647	698
Blackwell *v.* England	8 E. & B. 541	633
Board of Education *v.* Rice	[1911] A. C. 179	168
Boehm *v.* Combe	2 M. & S. 172	444

		PAGE
Boissiere *v.* Brockner	6 Times L. R. 85	201
Booth *v.* Ferrett	25 Q. B. D. 87	492
Boulter *v.* Kent Justices	[1897] A. C. 556	111
Bourne *v.* Lowndes	22 J. P. 354	39
Bowles *v.* Attorney-General	[1912] 1 Ch. 123	582
Bramwell *v.* Spiller	21 L. T. 672	452
Brickwood & Co. *v.* Reynolds	[1898] 1 Q. B. 95	357
Brierly *v.* Kendall	17 Q. B. 937	245
Bright, Ex parte	10 Ch. D. 566	452
British Oil and Cake Mills *v.* Port of London Authority	[1914] 1 K. B. 5	22
Briton Medical and General Association, In re	32 Ch. D. 503	125
Brooks *v.* Bagshaw	[1904] 2 K. B. 798	129
Brown *v.* Bristol and Exeter Railway Company	4 L. T. 830	513
Bruce *v.* Burton	4 Tax Cases, 399	154, 710
Buchanan *v.* Rucker	1 Camp. 63	199
Bullock *v.* London General Omnibus Company	[1907] 1 K. B. 264	285
Burgess *v.* Morton	[1896] A. C. 136	342
Busby *v.* Chesterfield Waterworks Company	E. B. & E. 176	228
Bush *v.* Whitehaven Trustees	52 J. P. 392	667
Bussey *v.* Storey	4 B. & Ad. 98	570
Butterley Company *v.* New Hucknall Colliery Company	[1910] A. C. 381	645

C.

Cairney *v.* Back	[1906] 2 K. B. 746	697
Carron Iron Company *v.* Maclaren	5 H. L. C. 416	722
Castioni, In re	[1891] 1 Q. B. 149	79
Chaffers, In re	76 L. T. 351	135
Challinor, Ex parte	16 Ch. D. 260	148
Chinery *v.* Viall	5 H. & N. 288	245
City of Lincoln (Master and Owners of S.S.) *v.* Smith	[1904] A. C. 250	548
Clayton *v.* Gregson	5 Ad. & E 302	645
Coleman *v.* Goldsmith	43 J. P. 718	260
Colley's Patents *v.* Metropolitan Water Board.	[1911] 2 K. B. 38; [1912] A. C. 24	225, 226
Combined Weighing and Advertising Machine Company, In re	43 Ch. D. 99	697
Cope *v.* Landles	13 Times L. R. 18	28
Counhaye, In re	L. R. 8 Q. B. 410	79
Couturier *v.* Hastie	8 Ex. 40	450
Cowles *v.* Dunbar	2 C. & P. 565	601
Crawley *v.* Isaacs	16 L. T. 529	200
Crippen, In re	[1911] P. 108	3
Curtis *v.* Peek	13 W. R. 230	645

D.

Davey *v.* Warne	14 M. & W. 199	508
Davidson *v.* Burnand	L. R. 4 C. P. 117	443
Davis *v.* Freethy	24 Q. B. D. 519	702
——— *v.* Morton	[1913] 2 K. B. 479	70

		PAGE
Dent *v.* Smith	L. R. 4 Q. B. 414	201
Diamond, The	[1906] P. 282	437, 548
Dicks *v.* Yates	18 Ch. D. 76	625
Dimes *v.* Grand Junction Canal Proprietors	3 H. L. C. 759	68
Doe *v.* Abel	2 M. & S. 541	517
Dunlop Pneumatic Tyre Company *v.* Actiengesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.	[1902] 1 K. B. 342	717

E.

Edgeworth *v.* Inland Revenue Commissioners	[1912] 2 I. R. 606	354
Emslie *v.* Paterson	24 R. (Just. Cas.) 77	95
Evans, Ex parte	9 Q. B. 279	199
——— *v.* Rival Granite Quarries	[1910] 2 K. B. 979	697
Exeter Corporation *v.* Heaman	37 L. T. 534	40

F.

Fanny, The	28 Times L. R. 217	437
Finck *v.* Tranter	[1905] 1 K. B. 427	696
Firth, Ex parte	19 Ch. D. 419	148
Fleet *v.* Murton	L. R. 7 Q. B. 126	451
Frederick *v.* Bognor Water Company	[1909] 1 Ch. 149	225
Freeman *v.* Hensler	64 J. P. 260	666
Freer *v.* Murray	[1894] A. C. 576	469

G.

Gabay *v.* Lloyd	3 B. & C. 793	443
Geisse *v.* Taylor	[1905] 2 K. B. 658	697
General Horticultural Company, In re	32 Ch. D. 512	697
Gilbert *v.* Jones	[1905] 2 K. B. 691	493
Gillatt & Watts *v.* Colquhoun	2 Tax Cases, 76	364
Glendarroch, The	[1894] P. 226	436
Glendevon, The	[1893] P. 269	304
Gough and Aspatria, Silloth and District Joint Water Board, In re	[1904] 1 K. B. 417	344
Gracey *v.* Banbridge	[1905] 2 I. R. 209	40
Grant *v.* Anderson	[1892] 1 Q. B. 108	715
Great Eastern Steamship Company, In re	53 L. T. 594	464
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	366
Grimes *v.* Lethem	3 Tax Cases, 622	155, 710
Grove *v.* Dubois	1 T. R. 112	450

H.

Hagmaier *v.* Willesden Overseers	[1904] 2 K. B. 316	111
Hall *v.* Booth	3 Nev. & M. 316	600
Hamilton, Fraser & Co. *v.* Pandorf	12 App. Cas. 518	443
Hamlyn *v.* Wood	[1891] 2 Q. B. 488	673
Hargreaves *v.* Dawson	24 L. T. 428	476

		PAGE
Harrogate Corporation *v.* Mackay	[1907] 2 K. B. 611	228
Helby *v.* Matthews	[1895] A. C. 471	245
Hercules (Actiesselskabet Dampskib) *v.* Grand Trunk Pacific Railway Company	[1912] 1 K. B. 222	718
Heydon's Case	3 Rep. 7b	646
Hooper *v.* Riddle & Co.	95 L. T. 424	61
Hornby *v.* Lacy	6 M. & S. 166	451
Hull Ropes Company *v.* Adams	65 L. J. (Q.B.) 114	249
Hutchins *v.* Chambers	1 Burr. 579	288

I.

Ilchester (Parish), Ex parte	25 J. P. 56	612
Inland Revenue Commissioners *v.* Anglesey (Marquess)	[1913] 3 K. B. 62	651

J.

Jackson *v.* Mumford	8 Com. Cas. 61	444
Johnson *v.* Burges	47 L. J. (Ch.) 552	284
——— *v.* Edgware, &c. Railway Company	35 Beav. 480; 14 L. T. 45	517
——— *v.* Stear	15 C. B. (N.S.) 330	245
Jones *v.* Jones	[1910] 2 K. B. 262	26
——— *v.* Rowland	80 L. T. 630	209
——— *v.* Tarleton	9 M. & W. 675	108
Juson *v.* Dixon	1 M. & S. 601	288

K.

King *v.* Metropolitan District Railway Company	72 J. P. 294	601
Krans, Ex parte	1 B. & C. 258	79
Kydd *v.* Liverpool Watch Committee	[1908] A. C. 327	619, 711

L.

La Bourgogne	[1892] 1 Q. B. 108	718
Laing *v.* Hollway	3 Q. B. D. 437	304
Lamb *v.* Evans	[1893] 1 Ch. 218	625
Langdon *v.* Broadbent.	37 L. T. 434	492
Lavell *v.* Ritchings	[1906] 1 K. B. 480	289
Lawrence *v.* Aberdein	5 B. & Al. 107	443
———— *v.* Aflalo	[1904] A. C. 17	626
Lawson *v.* Wallasey Local Roard	47 L. T. 625; 48 L. T. 507	666
Lee *v.* Butler	[1893] 2 Q. B. 318	245
Leeds Corporation *v.* Ryder	[1907] A. C. 420	612
Leslie *v.* Metropolitan Asylums District Managers	68 J. P. 86	666
Leyman *v* Latimer	3 Ex. D. 352	3
Logsdon *v.* Booth	[1900] 1 Q. B. 401	492
———— *v.* Trotter	[1900] 1 Q. B. 617	492
London County Council *v.* Attorney-General	[1902] A. C. 165	680
Lucas and Chesterfield Gas and Water Board, In re	[1909] 1 K. B. 16	343

		PAGE
Lumsden *v.* Inland Revenue Commissioners	[1913] 3 K. B. 809	342, 533
Lynn *v.* Bell	Ir. R. 10 C. L. 487	121
Lyons & Co. *v.* London Corporation	[1909] 2 K. B. 588	230
Lysaght *v.* Edwards	2 Ch. D. 499	327

M.

McKone *v.* Wood	5 C. & P. 1	630
Maddocks *v.* Wren	2 Rep. Ch. 109	698
Maillard *v.* Argyle (Duke)	6 Man. & G. 40	644
Marshall *v.* Graham	[1907] 2 K. B. 112	210
Mersey Docks and Harbour Board *v.* Henderson	13 App. Cas. 595	9
Messina *v.* Petrococchino	L. R. 4 P. C. 144	200
Metropolitan Amalgamated Estates, In re	[1912] 2 Ch. 497	698
Metropolitan Water Board *v.* Colley's Patents	[1911] 2 K. B. 38	233
——— *v.* Johnson	[1913] 3 K. B. 904	34
——— *v.* London, Brighton and South Coast Railway Company	[1910] 2 K. B. 890	226
Mitchell *v.* Guildford Union	68 J. P. 84	666
Morris *v.* Cleasby	4 M. & S. 566	450
Mortimer *v.* M'Callan	6 M. & W. 58	105
Mure *v.* Kay	4 Taunt. 34	600

N.

Neal *v.* Devenish	[1894] 1 Q. B. 544	275
Nelson & Sons *v.* Nelson Line, Liverpool	[1907] 2 K. B. 705	304
Nelson Line (Liverpool) *v.* James Nelson & Sons	[1908] A. C. 16	548
Newby *v.* Van Oppen	L. R. 7 Q. B. 293	722
Newtownards *v.* Woods	I. R. 11 C. L. 506	40
Norton *v.* Yates	[1906] 1 K. B. 112	697
Norwich Corporation *v.* Norwich Electric Tramways Company	[1906] 2 K. B. 119	275

O.

Ochsenbein *v.* Papelier	L. R. 8 Ch. 695	200
Ossalinsky (Countess) and Manchester Corporation, In re	Browne and Allan's Law of Compensation, 2nd ed., p. 659	344

P.

Padwick *v.* Scott	2 Ch. D. 736	284
Parker *v.* Talbot	[1905] 2 Ch. 643	491
Parsons *v.* Lakenheath School Board	58 L. J. (Q.B.) 371	168
Pemsel's Case	[1891] A. C. 531	646
Perkins *v.* Dangerfield	51 L. T. 535	513
Phillips *v.* Barber	5 B. & Al. 518	443

		PAGE
Pickering *v.* Ilfracombe Railway Company	L. R. 3 C. P. 235; 37 L. J. (C.P.) 118	701
Pidgeon *v.* Great Yarmouth Waterworks Company	[1902] 1 K. B. 310	225
Pike *v.* Ongley	18 Q. B. D. 708	452
Pine *v.* Barnes	20 Q. B. D. 221	26
Pletts *v.* Beattie	[1896] 1 Q. B. 519	42
—— *v.* Campbell	[1895] 2 Q. B. 229	42

R.

Randle *v.* Clay Cross Company	[1913] 3 K. B. 795	680
Read *v.* Lincoln (Bishop)	[1892] A. C. 644	647
Redhill Gas Company *v.* Reigate Rural Council	[1911] 2 K. B. 565	568
Reg. *v.* Antrim Justices	[1895] 2 I. R. 603	70
—— *v.* Barker	25 Q. B. D. 213	570
—— *v.* Beighton	18 Cox, C. C. 535	414
—— *v.* Bell	15 Times L. R. 487	112
—— *v.* Bird	62 J. P. 309	111
—— *v.* Bourdon	2 Car. & K. 366	3
—— *v.* Bridge	24 Q. B. D. 609	619
—— *v.* Brown	L. R. 2 Q. B. 630	343
—— *v.* Cockerton	[1901] 1 K. B. 322, 726	211
—— *v.* County Tyrone Justices	[1901] 2 I. R. 497	633
—— *v.* Curzon	L. R. 8 Q. B. 400	484
—— *v.* Drury	3 Car. & K. 193	69
—— *v.* Duncan	7 Q. B. D. 198	68
—— *v.* Ganz	9 Q. B. D. 93	79
—— *v.* Holmes	12 Q. B. D. 23	272
—— *v.* Income Tax Commissioners	21 Q. B. D. 313	156
—— *v.* Ingham	5 B. & S. 257	199
—— *v.* Kent Justices	44 J. P. 298	612
—— *v.* Liverpool Justices	11 Q. B. D. 638	485
—— *v.* Ollis	[1900] 2 Q. B. 758	416
—— *v.* Rawlins	8 C. & P. 439	111
—— *v.* Russell	3 E. & B. 942	68
—— *v.* Senior	[1899] 1 Q. B. 283	218
—— *v.* South Holland Drainage Committee	8 Ad. & E. 429	612
—— *v.* Stock	8 Ad. & E. 405	711
—— *v.* Surrey Justices	L. R. 5 Q. B. 466	613
—— *v.* West Riding Justices	21 Q. B. D. 258	476
—— *v.* Yates	11 Q. B. D. 750; 14 Q. B. D. 648	129
Reid's Brewery Co. *v.* Male	[1891] 2 Q. B. 1	363
Rex *v.* Allen	15 East, 333	71
—— *v.* Ball	[1911] A. C. 47	416
—— *v.* Bond	[1906] 2 K. B. 389	415
—— *v.* Brixton Prison (Governor)	[1911] 2 K. B. 82	79
—— *v.* Clarke	3 Burr. 1362	84
—— *v.* Galway Justices	[1906] 2 I. R. 499	68
—— *v.* Gillespie	[1904] 1 K. B. 174	633
—— *v.* Hanson	4 B. & Al. 519	711
—— *v.* Holloway Prison (Governor)	87 L. T. 332	79
—— *v.* Local Government Board	[1911] 2 I. R. 331	168
—— *v.* Marks	3 East, 157	79
—— *v.* Marsham	[1912] 2 K. B. 362	70

		PAGE
Rex *v.* O'Connor	[1913] 1 K. B. 557	125
—— *v.* Parke	[1903] 2 K. B. 432	124
—— *v.* Ridgway	5 B. & Ald. 527	71
—— *v.* Waterford Justices	[1901] 2 I. R. 548	70
Richards *v.* Banks	58 L. T. 634	60
Richardson *v.* Willis	L. R. 8 Ex. 69	3, 125
Ripley *v.* Great Northern Railway Company	L. R. 10 Ch. 435	344
River Wear Commissioners *v.* Atkinson	2 App. Cas. 743	645
Robertson *v.* Jackson	2 C. B. 412	645
Robinson *v.* Nesbitt	L. R. 3 C. P. 264	701
Robson *v.* Smith	[1895] 2 Ch. 118	697
Royal College of Veterinary Surgeons *v.* Collinson	[1908] 2 K. B. 248	94
——— *v.* Groves	57 J. P. 505	94
——— *v.* Robinson	[1892] 1 Q. B. 557	94
Royal Mail Steam Packet Company and River Plate Steamship Company, In re	[1910] 1 K. B. 600	304
Russell *v.* Coggins	8 Ves. 34	317
——— *v.* North of Scotland Bank	3 Tax Cases, 14; 28 Sc. L. R. 389; 18 R. 543	155, 710
——— *v.* Town and County Bank	13 App. Cas. 418	363

S.

Saccharin Corporation *v.* Chemische Fabrik von Heyden Aktiengesellschaft	[1911] 2 K. B. 516	715
St. Martin's Vestry *v.* Gordon	[1891] 1 Q. B. 61	229
Saull *v.* Browne	L. R. 10 Ch. 64	126
Saunders *v.* Richardson	7 Q. B. D. 388	209
Schibsby *v.* Westenholz	L. R. 6 Q. B. 155	199
Schofield, Ex parte	[1891] 2 Q. B. 428	126
Sewell *v.* National Telephone Company	[1907] 1 K. B. 557	600
Shaftesbury *v.* Russell	1 B. & C. 666	289
Sharpe *v.* Wakefield	22 Q. B. D. 239	647
Shaw *v.* Foster	L. R. 5 H. L. 321	330
Shore *v.* Wilson	9 Cl. & F. 355	645
Smart *v.* Watts	[1895] 1 Q. B. 219	275
Smith *v.* Lion Brewery Company	[1909] 1 K. B. 711; [1911] A. C. 150	361, 364
—— *v.* Richmond	[1898] 1 Q. B. 683	34
Smitton *v.* Orient Line	12 Com. Cas. 270	437
South Suburban Gas Company *v.* Metropolitan Water Board	[1909] 2 Ch. 666	226
South-West Suburban Water Company *v.* St. Marylebone Union	[1904] 2 K. B. 174	225
Southwell *v.* Savill Brothers	[1901] 2 K. B. 349	364
Spencer, Ex parte	1 Per. & Dav. 358	69
Spirit of the Ocean, The	Br. & L. 336; 34 L. J. (Adm.) 74	437
Stammers *v.* Yearsley	10 Bing. 35	600
Steel *v.* State Line Steamship Company	3 App. Cas. 72	547

		PAGE
Stepney and Bow Educational Foundation (Governors) *v.* Inland Revenue Commissioners	[1913] 3 K. B. 570	641
Stevens *v.* Green	23 Q. B. D. 143	485
Stretch *v.* White	25 J. P. 485	40
Strong & Co. *v.* Woodifield	[1905] 2 K. B. 350	365
Sturmey Motors, Ld., In re	[1913] 1 Ch. 16	289
Sweet *v.* Benning	16 C. B. 459	625

T.

Tarbath, Ex parte	31 L. T. 513	484
Tennant *v.* Smith	[1892] A. C. 150	365
Thames and Mersey Marine Insurance Company *v.* Hamilton, Fraser & Co.	12 App. Cas. 484	443
Thompson & Shackell *v.* Veale	74 L. T. 130	249
Thomson *v.* Hart	18 R. (Just. Cas.) 3; 28 S. L. R. 28	464
Thorn *v.* London Corporation	1 App. Cas. 120	671
Thorpe *v.* Priestnall	[1897] 1 Q. B. 159	125
Timothy *v.* Simpson	5 Tyr. 244	600
Torquay Market Company *v.* Burridge	48 J. P. 71	41
Tottenham Urban Council *v.* Rowley	[1912] 2 Ch. 633; [1914] A. C. 95	668
Tower Justices *v.* Chambers	[1904] 2 K. B. 903	469
Truman, Hanbury, Buxton & Co. *v.* Inland Revenue Commissioners	[1912] 3 K. B. 377	517
Turney *v.* Dodwell	3 E. & B. 136	644

V.

Virginia Carolina Chemical Company *v.* Norfolk and North American Steam Shipping Company	[1912] 1 K. B. 229	421, 542

W.

Wahlberg *v.* Young	45 L. J. (Q.B.) 783	546
Walter *v.* Lane.	[1900] A. C. 539	625
Warkworth, The	9 P. D. 20	437
Wason, Ex parte	L. R. 4 Q. B. 573	133
Watney & Co. *v.* Musgrave	5 Ex. D. 241	363
Watts *v.* Porter	3 E. & B. 743	699
West Ham Churchwardens *v.* Fourth City Mutual Building Society	[1892] 1 Q. B. 654	369
Westminster Corporation *v.* Gordon Hotels	[1906] 2 K. B. 39; [1907] 1 K. B. 910; [1908] A. C. 142	229, 616, 619
White, Ex parte	L. R. 6 Ch. 397	451
White & Hales *v.* Islington Corporation	[1909] 1 K. B. 133	369
Whitehouse, Ex parte	32 Ch. D. 512	697
Whitworth *v.* Darbishire	68 L. T. 216	285
Wickham *v.* Wickham	2 K. & J. 478	452
Wilmott *v.* Freehold House Property Company	51 L. T. 552	285
Wolff *v.* Koppel	5 Hill, 456; 8 Ex. 56, n.	451

		PAGE
Woolwich Overseers *v.* Robertson	6 Q. B. D. 654	9
Wright *v.* Simpson	6 Ves. 714	452
Wyatt *v.* Barnard	3 V. & B. 77	625
Wylde *v.* Legge	84 L. T. 121	249
Wylie Hill *v.* Inland Revenue Commissioners	1912 S. C. 1246	579
Wythes, In re	[1893] 2 Ch. 369	332

X.

Xantho, The	12 App. Cas. 503	44

Y.

Young and Harston's Contract, In re	31 Ch. D. 168	438, 560

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

MASH, Appellant *v.* DARLEY, Respondent.

1913

Oct. 15.

Bastardy—Evidence—Corroboration—Conviction for having had Unlawful Carnal Knowledge—Proof of Conviction—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

Upon the hearing of a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, the only evidence adduced in corroboration of that of the complainant was the evidence of a person who deposed that he had been present at the trial and conviction of the alleged father of the complainant's child at the assizes upon an indictment charging him with having had unlawful carnal knowledge of the complainant:—

Held, that evidence of the conviction was admissible; that the conviction was sufficiently proved; and that this evidence was corroboration of the complainant's evidence in a material particular as required by the statute.

Case stated by justices.

On February 27, 1913, the respondent preferred a complaint at petty sessions against the appellant, under the Bastardy Laws

1913

MASH v. DARLEY.

Amendment Act, 1872, alleging that the appellant was the father of her bastard child and applying for an order under the statute. The justices, having adjudged the appellant to be the putative father and made an order for the payment of 4*s*. a week, stated a case for the opinion of the Court to the following effect.

Upon the hearing of the complaint the respondent gave evidence that the appellant had had connection with her in December, 1911, and in January, February, and March, 1912; that no other man had interfered with her during that period; and that she had been delivered of a bastard child in November, 1912.

The only evidence by way of corroboration as required by the statute (1) tendered by the respondent was that of Tebby, a superintendent of police, to the effect that he was present at the trial and conviction of the appellant at the assizes held at Northampton in October, 1912, upon an indictment charging the appellant that on or about March 22, 1912, and on divers other occasions within six months then last past he did unlawfully and carnally know the respondent, she then being above the age of thirteen and under the age of sixteen years, and when the appellant was sentenced to eighteen months' imprisonment.

The respondent contended that the evidence of the superintendent was admissible and amounted to corroboration of her evidence in some material particular as required by the statute. The appellant contended that the said evidence was inadmissible in point of law; that it was not proof of the fact of the said conviction; that, if admissible, it did not amount to corroboration as required by the statute; and that, therefore, there was no corroboration of the respondent's evidence to satisfy the statute and the justices were bound in law to refuse the order applied for.

The justices admitted the evidence of the superintendent and held that the conviction of the appellant was sufficiently proved, and came to the conclusion upon the whole of the facts which had been proved before them that the evidence of the respondent was corroborated in some material particular as required by the statute.

(1) 35 & 36 Vict. c. 65, s. 4.

1913

MASH v. DARLEY.

C. K. Tatham (*Campion* with him), for the appellant. The conviction of the appellant was not admissible as evidence in this matter; it was res inter alios acta: *Leyman* v. *Latimer*. (1) The decision in *In re Crippen* (2) proceeded upon a principle which is not applicable in this case, that is, that when a convicted felon seeks to establish claims which result from his crime, his conviction is admissible in evidence and is presumptive proof of the commission of the crime. Even if admissible in evidence, proof of the conviction is no corroboration of the evidence of the complainant in this case in some material particular as required by s. 4 of the Bastardy Laws Amendment Act, 1872; at the most the conviction is evidence of the opinion of a jury upon the evidence given before them in a case where corroboration was not essential. In any case there was no sufficient proof of the conviction. The only proper proof of a conviction is by a certified copy of the record under the provisions of s. 13 of the Evidence Act, 1851 (3), which applies to proof in all proceedings whether civil or criminal: *Richardson* v. *Willis*. (4) The evidence of a person who was present at the trial and conviction is not sufficient: *Reg.* v. *Bourdon*. (5)

Barrington Ward, for the respondent, was not called upon to argue.

RIDLEY J. It seems to me that there was before the justices corroboration of the complainant's evidence. The justices held that the evidence of Tebby as to the conviction of the appellant was corroboration of the evidence of the complainant in a material particular as required by the statute. The question is whether evidence of the conviction was admissible, and whether, if admissible, it proved more than the mere fact of conviction and was corroboration of the complainant's evidence within s. 4 of the Bastardy Laws Amendment Act, 1872. I am of opinion that the conviction was admissible in evidence and was presumptive proof of the commission of the crime of which the appellant was convicted according to the principle stated in

(1) (1878) 3 Ex. D. 352.
(2) [1911] P. 108.
(3) 14 & 15 Vict. c. 99.
(4) (1872) L. R. 8 Ex. 69.
(5) (1847) 2 Car. & K. 366.

1913

MASH v. DARLEY.

Ridley J.

In re Crippen (1), where it was held that proof of the conviction was presumptive proof of the commission of the crime. In that case the President said: "Where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator, from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime." It seems to me that this case comes within that principle, and that the conviction was in these proceedings presumptive proof that the appellant had committed the offence.

Another point has been raised, that the conviction ought to have been proved by a certified copy of the record under s. 13 of the Evidence Act, 1851. That section, however, only provides that where in any proceeding "it may be necessary to prove the trial and conviction of any person," it shall not be necessary to prove the record, but a certified copy shall be sufficient. Accordingly convictions are so proved where it is necessary to prove previous convictions, as in the case of habitual criminals under the Prevention of Crime Act, 1908, and in the case of other criminal statutes. In my opinion, in a case like this, where it is not necessary to prove a conviction but evidence of a conviction is offered by the complainant simply as part of the evidence in support of her case, the evidence of a person who was present is sufficient. I think, therefore, that there was sufficient evidence before the justices of the conviction of the appellant of having had carnal knowledge of the respondent, this not being a case in which it was necessary to prove the conviction. There is another ground upon which I think that the evidence is admissible, that is, as evidence of the opinion of the jury expressed in the presence of the appellant. I do not see how it can be said that that was not corroborative evidence against him. There is no authority to that effect, but as a matter of principle I do not see why this evidence of the verdict of a jury was not some corroboration of the evidence of the respondent. Upon both grounds,

(1) [1911] P. 108, 115.

1913

MASH v. DARLEY.

therefore, either as a conviction or as a piece of evidence, I think this evidence was admissible and was corroboration.

SCRUTTON and BAILHACHE JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Samuel Price & Sons, for Darnell & Price, Northampton.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Simpson & Mason, Higham Ferrers.*

J. H. W.

BRITISH OIL AND CAKE MILLS, LIMITED *v.* PORT OF LONDON AUTHORITY.

1913
Oct. 17.

[1913 B. 1852.]

Docks—Port Rates—Exemption—Goods imported for Transhipment only—Goods exported "coastwise"—Transhipment in Port of London for Rochester—Conveyance "by sea only"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *Schedule*, *s.* 9.

Sect. 13, sub-s. 1, of the Port of London Act, 1908, provides that, subject to the provisions of that section, all goods imported from parts beyond the seas or coastwise into the Port of London or exported beyond the seas or coastwise from that port shall, subject to any exemptions or rebates contained in a provisional order under the section, be liable to port rates, provided that "the provisional order . . . . shall provide for exempting from such rates goods imported for transhipment only . . . ."

Sect. 13, sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point . . . ."

Sect. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, provides that "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only . . . . For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period" and in the manner

1913

BRITISH OIL AND CAKE MILLS, LIMITED v. PORT OF LONDON AUTHORITY.

provided by the section to have been intended for transhipment and to have been shipped again as soon as practicable within the Port of London for conveyance by sea to such other port:—

Held, that the expression "coastwise" used in s. 9 of the schedule to the Act of 1910 must be construed in its ordinary sense, unaffected by the definition in s. 13, sub-s. 5, of the Port of London Act, 1908; that the expression "by sea only" in s. 9 is there used, not in contradistinction to "by river," but in contradistinction to "by land"; and therefore that goods imported into the Port of London from beyond the seas, transhipped there, and conveyed by barge to the port of Rochester are exempt from the payment of port rates to the Port of London Authority.

TRIAL of action before Pickford J. without a jury.

The plaintiffs claimed 1*l.* 13*s.* 4*d.* as money paid by them to the defendants under duress in order to obtain the release of 100 tons of linseed, the plaintiffs' property. The 1*l.* 13*s.* 4d. was claimed by the defendants as port dues.

The facts were agreed by the parties as follows:—

The steamship *Assyria* from Calcutta and other ports with a general cargo was reported on June 12, 1912, at the Custom House, London, to have arrived for discharge at Victoria Docks, London.

Part of this cargo, namely, 100 tons of linseed, belonged to the plaintiffs, who on June 12, 1912, as owners of the goods presented and delivered to the collector of the Port Authority a certificate under their hands. The certificate was in the form required by the Port Authority under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, in respect of goods imported into the Port of London and intended for transhipment, and was entitled "Inwards port rates exemption certificate." The certificate stated that the goods were intended for transhipment and described them as linseed, the quantity being 1364 bags weighing 100 tons, the destination and route being Rochester in the county of Kent, and the mode of conveyance being by sailing craft belonging to the London and Rochester Barge Company, Limited. The certificate was given within the period and in the manner prescribed by the section.

The Port Authority declined to accept such exemption certificate and made a note on it as follows: "Inside line which extends from Colne Point to Reculvers." Thereupon the plaintiffs paid under protest the sum of 1*l.* 13*s.* 4*d.*, being the

amount claimed by the Port Authority for foreign inwards port rate on the 100 tons of linseed at the rate of 4*d.* per ton.

The said 100 tons of linseed were shipped again at the Victoria Docks within the limits of the Port of London by being put overside from the *Assyria* into a sailing barge, and the goods were then conveyed by that barge to the port of Rochester on the river Medway as soon as practicable after June 12, 1912, namely, on July 2, 1912.

The point in dispute was whether under the above circumstances the foreign inwards port rate was legally chargeable on the 100 tons of linseed.

Talbot, K.C., and *Morton Smith*, for the plaintiffs. The question turns on the construction of certain sections of the Port of London Act, 1908 (1), and the Port of London (Port Rates on

(1) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 13, sub-s. 1: "Subject to the provisions of this section, ... all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix, not exceeding such rates as may be specified in any provisional order, made by the Board of Trade for the time being in force, but the port rates charged by the Port Authority shall at all times be charged equally to all persons in respect of the same descriptions of goods under the like circumstances, ..."

"Provided that—

. . . . . .

"(*b*) The provisional order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only."

Sub-s. 2 provides for the preparation and embodiment in a provisional order of a schedule of maximum port rates on goods.

Sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury in pursuance of the power conferred upon them by section one hundred and forty of the Customs Consolidation Act, 1876, ..."

Sect. 15 contains a prohibition of preferential dock charges.

1913

BRITISH OIL AND CAKE MILLS, LIMITED v. PORT OF LONDON AUTHORITY.

Goods) Provisional Order Act, 1910. (1) By s. 9 of the schedule to the latter Act the plaintiffs' goods are exempt from port rates inasmuch as they were imported from beyond the seas for transhipment only. The defendants contend that the goods are not exempt and they rely on s. 13, sub-s. 5, of the Port of London Act, 1908, which says that for the purpose of s. 13 goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, and they point out that the port of Rochester is not seaward of that line. That contention of the defendants is unsound. Sub-s. 5 of s. 13 is not a definition section in the ordinary sense; s. 49 is the definition section; and sub-s. 5 of s. 13 applies only to the operative part of s. 13, namely, sub-s. 1, and has no application to proviso (*b*) to sub-s. 1 or to s. 9 of the schedule to the Act of 1910. It is clear from the Act of 1908 that goods brought into the Medway ports were intended to be benefited in the matter of port rates: see s. 43.

George Wallace, K.C., and *Wootten*, for the defendants. The plaintiffs' goods are not exempt from port rates. Sect. 13 of the Act of 1908 is the section under which port rates are authorized. The exemptions from the payment of rates are dealt with by the same section, and the Legislature has said that for the purpose of that section goods intended for transhipment shall not be exempt unless they are carried by sea to a place seaward of the line mentioned in sub-s. 5. That sub-section must be read into s. 9

(1) Port of London (Port Rates on Goods) Provisional Order Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. c.), Schedule, s. 9: "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port.

"For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter excluding Sundays and holidays and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port . . . ."

of the schedule to the Act of 1910. The plaintiffs' goods admittedly were not conveyed by sea to a place seaward of that line; therefore they were not exported coastwise. [They referred to *Mersey Docks and Harbour Board* v. *Henderson* (1) and to s. 140 of the Customs Laws Consolidation Act, 1876.]

Further, in order that goods shall get exemption from port rates, they must, according to the terms of s. 9 of the schedule to the Act of 1910, have been imported from beyond the seas or coastwise "for the purpose of being conveyed by sea only" to another port. The goods in question were not conveyed by sea at all; they were conveyed by river, the river Thames extending down to a point beyond the entrance to the river Medway, as is shewn by s. 7, sub-s. 2 (*c*), and Sched. V. to the Act of 1908; see also s. 3 of the Thames Conservancy Act, 1894, and *Woolwich Overseers* v. *Robertson*. (2)

Talbot, K.C., in reply. The words "for the purpose of being conveyed by sea only" were inserted in s. 9 of the schedule to the Act of 1910 to exclude land traffic; the words were not intended to distinguish between conveyance by sea and conveyance by river. As to the argument that down to the mouth of the Medway is not sea, it is to be observed that the Port of London Authority has two functions; it is a conservancy board and a port authority; and the definition of the Thames relied on by the defendants is merely a definition for conservancy purposes.

PICKFORD J. In this case the plaintiffs claim 1*l.* 13*s.* 4*d.* as money paid by them to the defendants under protest in respect of some goods which went to Rochester. From the statement of agreed facts it appears that the steamship *Assyria* from Calcutta and other ports arrived for discharge at the Victoria Docks, London, on June 12, 1912, and that 100 tons of linseed, that part of her cargo which belonged to the plaintiffs, were shipped again at the Victoria Docks within the limits of the Port of London by being put overside from the *Assyria* into a sailing barge, and then conveyed by such barge to the port of Rochester as soon as practicable after June 12, 1912, namely, on July 2, 1912. The

(1) (1888) 13 App. Cas. 595, per Lord Halsbury, at p. 600.
(2) (1881) 6 Q. B. D. 654.

1913

BRITISH OIL AND CAKE MILLS, LIMITED v. PORT OF LONDON AUTHORITY.

Pickford J.

plaintiffs, as the owners of the linseed, delivered to the defendants an inwards port rates exemption certificate in the form required by the defendants under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, in respect of goods imported into the Port of London and intended for transhipment. The certificate stated that the goods were intended for transhipment and described them as linseed; it further stated the quantity, destination, route, and mode of conveyance. The defendants declined to accept that exemption certificate and made the following note thereon: "Inside line which extends from Colne Point to Reculvers." That refers to a line mentioned in a section of the Act of Parliament to which I shall have to refer later. The defendants' contention is that as the goods in question were to be carried to a place inside that line, that is, to the westward of it, the plaintiffs were not entitled to exemption from port rates.

Whether the plaintiffs were or were not entitled to exemption depends upon the construction of the Port of London Act, 1908, and the provisional order made under its powers. Sect. 13, sub-s. 1, of the Act of 1908 provides that "Subject to the provisions of this section, as from such day as may be fixed by the Board of Trade not being more than thirteen weeks after the provisional order embodying the schedule mentioned in sub-section 2 of this section has been confirmed by Parliament, all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix . . . ." To that sub-section there are two provisoes, (*a*) and (*b*), the latter being important; it is as follows: "The provisional order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only." Sub-s. 5 of the same section is in these terms: "For the purpose of this

section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury in pursuance of the power conferred upon them by section one hundred and forty of the Customs Consolidation Act, 1876, ..." These are the whole of the provisions of s. 13 that I need read. Sect. 15 prohibits preferential dock charges.

A provisional order was made under the powers conferred by s. 13 and confirmed by the Port of London (Port Rates on Goods) Provisional Order Act, 1910, s. 9 of the schedule to which is in these terms: "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port." This part of the section therefore fulfils the terms of the first part of proviso (*b*) to s. 13 of the Act of 1908, namely, in providing for exempting from port rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port. Sect. 9 puts those two classes together under the one comprehensive term of "transhipment goods," and there the matter ends so far as the goods which remain on board the vessel in which they were imported for conveyance to another port are concerned. The latter part of s. 9 of the schedule to the Provisional Order Act does not deal with them at all, and therefore they remain free from rates whether they come from or go to a place inside or outside the line to which the Port Authority refer. But the second part of s. 9 of the schedule to the Provisional Order Act, 1910, deals with the other class of transhipment goods, namely, goods imported for transhipment only. It says: "For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1.) to have been intended

1913

BRITISH OIL AND CAKE MILLS, LIMITED v. PORT OF LONDON AUTHORITY.

Pickford J.

for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter excluding Sundays and holidays and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port . . . ." Reading that part of the section by itself and apart from a question as to the meaning of the expression "by sea only" the matter seems fairly clear. "Goods imported for transhipment only" would mean goods coming from beyond the seas or coastwise into the Port of London and conveyed by sea only to another port whether beyond seas or coastwise, that is anywhere at all. But the contention of the Port Authority is that I must read into or take as the definition of "coastwise" sub-s. 5 of s. 13 of the Act of 1908, and therefore that the expression "goods imported for transhipment only" must be read as meaning goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise, "coastwise" meaning a place seaward of the line drawn from Reculvers Towers to Colne Point. If that contention is correct, the goods now in question were not taken to a place seaward of that line, the port of Rochester being inside the line. I do not think that is the meaning of sub-s. 5 of s. 13. I think that sub-s. 5 means that goods are not to be considered as imported or exported coastwise for the purpose of the operative part of the section, namely, sub-s. 1, unless they come from or go to a place seaward of the line. The effect is that unless goods are imported from, or exported to, a place seaward of that line they are not to pay dues. I do not think sub-s. 5 of s. 13 was intended to give a definition of "coastwise" wherever that expression may appear in the Act of 1908 or in the Provisional Order Act. Looking at the matter in that light I think the word "coastwise" in s. 9 of the schedule to the Act of 1910 must be read in its ordinary sense, unaffected by sub-s. 5 of s. 13 of the Act of 1908.

Mr. Wallace for the Port Authority raised another contention, namely, that the goods in question were not conveyed by sea because they were conveyed down the river within the Port of

London and within the statutory limits of the river Thames. If the expression "sea" is to be distinguished in that way from river, no doubt the goods never did get out of the river Thames into the sea, but I do not think the words "by sea only" were meant to be limited in that way. These words do not mean to make a distinction between what is strictly speaking river and what is strictly speaking sea; they mean conveyed by sea as distinguished from conveyed by land, for example, by rail. Therefore in the ordinary acceptation of the expression carriage down the estuary of the Thames to the mouth of the Medway is included. In my view, therefore, the Port Authority were wrong in their contentions, and there must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Dollman & Pritchard, for Hayward, Smith & Challis, Rochester.*

Solicitors for defendants: *E. F. Turner & Sons.*

J. S. H.

1913
Oct. 17.

ANGLO-AMERICAN OIL COMPANY, LIMITED *v.* PORT OF LONDON AUTHORITY.

[1913 A. 669.]

Docks—Port Rates—Exemption—Goods imported for Transhipment only—Oil in Bulk—Oil imported by particular Steamer mixed with other Oil—Reshipment of Portions of Oil in Bulk—Goods reshipped "as soon as practicable"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *ss.* 13, 15—*Port of London* (*Port Rates on Goods*) *Provisional Order Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *Schedule, s.* 9.

By s. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, goods imported for transhipment only are exempt from port rates, and it is provided that "for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved . . . . (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter . . . . and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port. Every such certificate as aforesaid shall be under the hand of the owner of the goods . . . . and shall be in such form as the Authority may from time to time require. The certificate stating that the goods have been intended for transhipment shall contain particulars of the description quantity destination route and mode of conveyance of such goods . . . . The certificate stating that the goods have been shipped again as soon as practicable as aforesaid shall contain such particulars as the Authority shall require . . . ."

The plaintiffs received in the Port of London from beyond the seas a large quantity of oil in bulk by their ocean tank steamer *Narragansett.* When that steamer was reported at the Custom House the plaintiffs intended to tranship to various ports in the United Kingdom specific quantities of the oil she brought, and they accordingly delivered to the defendants inwards port rates exemption certificates under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, shewing the quantity in tons they intended to tranship to each port. The oil from the *Narragansett* was discharged into the plaintiffs' tanks at Purfleet, some of which were empty at the time, and some contained oil intended for distribution in the London district and also oil discharged from previous steamers. From these tanks the plaintiffs subsequently loaded the various quantities of oil mentioned in the inwards port rates exemption certificates, and conveyed them by small tank steamers to the ports mentioned in those certificates. The plaintiffs

then delivered to the defendants outwards port rates exemption certificates for the oil so transhipped, and claimed exemption from the payment of port rates in respect thereof. The defendants refused to admit the plaintiffs' claim for exemption on the ground, inter alia, that as the oil brought by the *Narragansett* had been mixed in the tanks with other oil not intended for transhipment, the identity of the oil transhipped with that imported could not be certified and proved so as to comply with s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910:—

Held, that the oil transhipped had been sufficiently identified with that certified for transhipment, and therefore that the plaintiffs were entitled to the exemption claimed.

Held, further, that the expression "shipped again as soon as practicable" in s. 9 means shipped again in the ordinary course of navigation and having regard to the facilities of the port, and does not mean shipped again as soon as practicable having regard to the convenience of the merchant's business.

TRIAL of action before Pickford J. without a jury.

The plaintiffs, who were dealers in oil, imported oil in bulk from places beyond the seas by means of ocean tank steamers. They possessed tanks for oil at Purfleet within the Port of London, and also possessed depots at various ports in the United Kingdom, such as Sunderland, Lowestoft, Plymouth, Dublin, and Grangemouth. Of the oil imported from abroad by the ocean tank steamers some was destined for distribution and sale in the London district from the tanks at Purfleet, and some was destined for distribution at the various other ports from the tanks at those ports. All the oil from overseas was discharged in bulk from the ocean tank steamers into the tanks at Purfleet. Such part as was destined for the other ports was subsequently reloaded on one or other of certain coasting tank steamers owned and employed by the plaintiffs for transporting imported oil from London to the various other ports above mentioned.

The provisional order made by the Board of Trade and confirmed by the Port of London (Port Rates on Goods) Provisional Order Act, 1910, prescribes the maximum port rates to be paid on goods of various descriptions, including, inter alia, oil, and provides that no port rates shall be charged by the Port of London Authority on transhipment goods, which expression is defined as meaning and including goods imported for transhipment only.

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

The facts giving rise to the plaintiffs' claim in the present action were as follows:—

On March 27, 1913, the ocean tank steamer *Narragansett* arrived in the Port of London carrying a large quantity of oil in bulk, the property of the plaintiffs. Of that oil the plaintiffs, at or before the time of the report of the *Narragansett* at the Custom House, intended to tranship 430 tons to Sunderland and 340 tons to Lowestoft, and they accordingly delivered to the defendants a certificate dated March 28, 1913, in the form provided by the defendants for the purpose. The certificate was in these terms:—

"Port of London Authority.

"Transhipment Goods.

"Inwards Port Rates Exemption Certificate.

"I hereby certify that the undermentioned goods are intended for transhipment, viz.: —

"Ship—Narragansett. From—New York.

"Reported at Custom House—March 27th. Place of Discharge—Purfleet.

Description of Goods and Marks.	No. of Packages.	Weight.				Name of Export Vessel.	Destination and Route.
		Tons.	Cwts.	Qrs.	Lbs.		
Petroleum lamp oil in bulk ..		430	—	—	—	Tioga .	Sunderland
Do.		340	—	—	—	Oneida.	Oulton Broad, Lowestoft

"Signature of Owner or Agent—Anglo-American Oil Co., Ltd.
P. W. W. Mills.

"Address—Shipping Dept., 36 and 38, Queen Anne's Gate, Westminster, S.W.

"Date—March 28th, 1913."

In pursuance of their said intention and certificate the plaintiffs caused 430 tons of oil from the *Narragansett* to be discharged

into one of their tanks (No. 14) at Purfleet which was empty. They further caused 220 tons to be discharged into the same tank—No. 14—and 120 tons to be discharged into an ordinary tank. The last-mentioned tank also contained at the time, or received from the *Narragansett*, a certain quantity of oil not intended for transhipment but intended for distribution in the London district.

On March 29, 1913, 421 tons of oil from tank No. 14 were loaded on the coasting tank steamer *Tioga* and were by it conveyed to Sunderland; and on March 31, 1913, 220 tons of oil from tank No. 14 and 120 tons from the ordinary tank were loaded on the coasting tank steamer *Oneida* and by it conveyed to Lowestoft. In respect of those quantities of oil conveyed to Sunderland and Lowestoft the plaintiffs signed outwards port rates exemption certificates in the form provided by the defendants. The following is a specimen of the forms used:—

"Port of London Authority.

"Transhipment Goods.

"Outwards Port Rates Exemption Certificate.

"I hereby certify that the undermentioned goods imported ex Narragansett from New York on the 26th March have been shipped as follows:—

"Export Ship—Tioga. Sailing from—Purfleet.

"Destination—Sunderland. Date—29th March, 1913.

Description of Goods and Marks.	No. of Packages.	Gross Weight.			
		Tons.	Cwts.	Qrs.	Lbs.
Petroleum lamp oil in bulk.		421			

"Signature of Owner or Agent of the Goods. } Anglo-American Oil Co., Ltd. P. W. W. Mills.

"Address—Shipping Dept., 36 and 38, Queen Anne's Gate, Westminster, S.W.

"Date—31st March, 1913."

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

Further, of the oil brought by the *Narragansett* the plaintiffs, at the time of her report at the Custom House, intended to tranship 650 tons to Plymouth, 680 tons to Dublin, and 300 tons to Grangemouth, and they accordingly delivered to the defendants an inwards exemption certificate dated March 28 which was in the same form as that shewn above in reference to the oil destined for Sunderland and Lowestoft except that in the column headed "Name of Export Vessel" the names of three steamers—the *Tioga*, the *Oneida*, and the *Osceola*—were bracketed, this method of naming the proposed export vessels being due to the fact that it was not then known which would be available for any particular voyage.

In pursuance of their said intention and certificate the plaintiffs caused 350 tons to be discharged into a certain tank, No. 6, and 300 tons into the above-mentioned tank No. 14 (for Plymouth), 430 tons into tank No. 6 and 250 tons into tank No. 14 (for Dublin), and 300 tons into tank No. 14 (for Grangemouth). Tank No. 14 at no material time contained any oil but that brought by the *Narragansett;* tank No. 6 was not empty when the *Narragansett* arrived; it contained oil discharged from previous ocean tank steamers, but that oil when so discharged was intended for transhipment by coasting tank steamers to other ports, and was not intended to be, and in fact never was, used for distribution in the London district.

The oil above mentioned intended for Plymouth, Dublin, and Grangemouth was duly conveyed to those ports, that intended for Plymouth being conveyed in three shipments, a quantity of oil for Avonmouth out of ordinary stock being also carried on two of the three voyages, the dates of which were April 13, 21, and 29. By the first of those three shipments 244 tons of oil ex *Narragansett* for Plymouth were loaded on the *Tioga*, which at the same time carried 477 tons for Avonmouth. Outwards exemption certificates were delivered by the plaintiffs to the defendants in respect of the oil conveyed to Plymouth, Dublin, and Grangemouth.

The defendants refused to admit the plaintiffs' right to exemption in respect of the oil conveyed as above mentioned to Sunderland, Lowestoft, Plymouth, Dublin, and Grangemouth

and demanded payment of inwards port rates thereon on the ground that on being discharged by the plaintiffs into their tanks as above mentioned the oil mentioned in the inwards certificates lost its identity; that the outwards certificates did not contain sufficient particulars of the oil to comply with the defendants' requirements and to enable them to identify the oil mentioned therein with any oil mentioned in the inwards certificates; and that the oil was not shipped again "as soon as practicable" within the meaning of the provisional order.

The plaintiffs paid under protest the rates demanded by the defendants and now claimed repayment thereof and a declaration that in regard to such quantities of oil discharged in bulk from the ocean tank steamers in London as when discharged were by them intended to be transhipped by the said coasting tank steamers to the said other ports, and were subsequently in fact so transhipped to those other ports, they were entitled to be exempt from the payment of port rates.

Macmorran, K.C., and *F. D. Mackinnon*, for the plaintiffs. The plaintiffs are entitled to the exemption claimed by them under s. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910. (1)

(1) Port of London (Port Rates on Goods) Provisional Order Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. c.), Schedule, s. 9: "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port.

"For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter excluding Sundays and holidays and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port. Every such certificate as aforesaid shall be under the hand of the owner of the goods . . . . or under the hand of a forwarding agent or of any other agent acting on behalf of the owner of the goods . . . . and shall be in such form as the Authority may from time to time require. The certificate stating that the goods have been intended for transhipment shall

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

The whole difficulty has arisen from the fact that the defendants have prepared forms of certificates with reference to goods in parcels and not to goods in bulk. If this oil had been imported in numbered casks the plaintiffs could have specified in the certificates the particular numbers intended to be transhipped and exemption could have been claimed in respect of those particular casks. There is, however, no reason in the nature of things why goods imported in bulk should be deprived of the exemption they would otherwise clearly obtain. Port rates are to be charged equally to all importers: see ss. 13 and 15 of the Port of London Act, 1908; and if the defendants' contention is right, that for oil in bulk exemption cannot be claimed, the merchant who imports his oil in casks will be getting a preference over the merchant who imports his oil in bulk. The defendants say that it is impossible for the plaintiffs to identify the oil transhipped with that which was imported, and that therefore the requirements of s. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, cannot be complied with. But it is only in name that the plaintiffs cannot identify the oil; in reality they can do so. If they discharge so many tons into a particular tank from the importing steamer, and within the proper time export the same quantity of oil taken out of the same tank, s. 9 is sufficiently complied with notwithstanding that the tank may also have contained oil intended for distribution in the London district. It is not necessary to identify the particular drops or atoms of oil; it is sufficient if it can be shewn that out of a larger bulk all the oil intended for transhipment has been taken and in fact transhipped.

---

contain particulars of the description quantity destination route and mode of conveyance of such goods and shall be delivered to the collector . . . . within seven days from the arrival of the goods or such further period as shall from time to time be appointed by the Authority. The certificate stating that the goods have been shipped again as soon as practicable as aforesaid shall contain such particulars as the Authority shall require and shall be delivered to the collector at or immediately after the time of shipment. The owner of any such goods as aforesaid shall at all times give such other information and evidence as may reasonably be required by the Authority or their agent in order to prove that such goods were intended for transhipment or have been shipped again as soon as practicable as aforesaid as the case may be."

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

George Wallace, *K.C.*, and *Wootten*, for the defendants. In order that the owner of goods shall be entitled to exemption from port dues under s. 9 of the schedule to the Act of 1910 the identity of the goods exported with those imported must be certified and proved. That has not been done by the plaintiffs. It may be conceded, but for the purposes of this case only, that the mere fact that goods are imported in bulk does not preclude the owners from claiming exemption. If, for example, the importing vessel arrives with oil in bulk, and there is an intention on the part of the cargo owners to tranship 400 tons of that cargo to Sunderland, and within seventy-two hours of the ship being reported 400 tons of the oil brought by her are set aside in a particular tank and that identical oil is thereafter transhipped to Sunderland, it may be that exemption could be claimed in respect of that consignment. But to be entitled to the exemption the merchant must export the identical oil he has certified, and no more. When the oil intended for transhipment is mixed with other oil it is no longer possible to identify any of it, and s. 9 cannot be complied with. Further, the oil must be reshipped "as soon as practicable." That requirement of s. 9 was not complied with in the case of the shipments to Plymouth. The *Narragansett* arrived on March 27; the inwards certificate in respect of the Plymouth oil—650 tons—was dated March 28; the 650 tons were taken to Plymouth in three shipments, on April 13, 21, and 29, larger quantities being at the same time taken to Avonmouth out of ordinary stock. By the first of those three shipments 244 tons only were loaded for Plymouth on the *Tioga* while 477 tons were at the same time conveyed by her to Avonmouth. It is therefore obvious that the plaintiffs did not reship the Plymouth oil "as soon as practicable," but were suiting their own convenience in connection with the shipments to Avonmouth.

Macmorran, *K.C.*, in reply. Goods are reshipped as soon as practicable if by the first available steamer as much is sent on as that steamer can carry.

PICKFORD J. In this case the facts so far as agreed, and they are agreed in all material particulars, are these: The plaintiffs

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

Pickford J.

bring into the Port of London from abroad considerable quantities of oil in tank steamers. They have storage tanks at Purfleet and in other parts of the country. In this particular case the places concerned were Sunderland, Lowestoft, Grangemouth, Dublin, and Plymouth. Some of the oil imported by the plaintiffs is put into tanks and is not carried elsewhere, but is distributed in London and probably by rail to various places inland; and some of it is put into tanks for the purpose of being taken out of the port again and conveyed by means of smaller tank steamers to storage places in different parts of the country. In this case when the plaintiffs' steamship *Narragansett* brought into the Port of London a cargo of oil certificates were made out by the plaintiffs claiming exemption from port rates. One of these certificates was in respect of 430 tons of oil for Sunderland and 340 tons for Lowestoft, the 430 tons to be conveyed by the *Tioga* and the 340 tons by the *Oneida;* and the other certificate was in respect of 650 tons to be carried to Plymouth, 680 tons to be carried to Dublin, and 300 tons to be carried to Grangemouth, these quantities being carried by the *Tioga*, the *Oneida*, or the *Osceola*, according to whichever was available. These three steamers were mentioned in the certificate not as allocated to any specific cargo, but as the three vessels which would be employed. A point was made by the defendants on the pleadings that that is not sufficient, but I think that so stating the mode of conveyance satisfies the condition which requires the mode of conveyance to be specified; it was certainly as specific as "sailing craft belonging to the London and Rochester Barge Company, Limited," which was the description given and accepted in *British Oil and Cake Mills, Ld.* v. *Port of London Authority*. (1) It possibly would have been enough to have said "by smaller tank steamer," but what was done was certainly quite sufficient.

Some of the oil on its arrival in the *Narragansett* was put into a tank No. 14 which was empty, and some of it was put into a tank, called an ordinary tank, which contained a certain quantity of oil not intended for transhipment but intended for

(1) Ante, p. 5.

distribution in the London district. The plaintiffs claimed exemption for all the oil mentioned in the inwards certificates. The defendants declined to allow the exemption, the ground being that it is necessary that the goods which are brought in for transhipment only, should, in order to be exempt, be capable of identification and should in fact be identified with the goods which are afterwards transhipped, and that as the oil was not kept in separate parcels according to the destination of each lot, that is to say, 430 tons for Sunderland, 340 tons for Lowestoft, 650 tons for Plymouth, 680 tons for Dublin, and 300 tons for Grangemouth, in separate tanks, and it could not be ascertained which part of the bulk went to which place, the goods could not be identified and therefore were not entitled to exemption. If that contention were right to its full extent it would in a great measure do away with the value of this exemption in cases of bulk cargo. I am told that the question does not arise except as to oil cargoes in bulk, because grain in bulk is, I am informed, not brought in for transhipment, but I think the exemption must have been intended to be applicable to bulk cargoes if they came within the spirit of the enactment, which in my view was not intended to be confined to cargoes in packages. Mr. Wallace for the defendants admitted, and I think was bound to admit, that if each ocean steamer as she came in put the parcel for each place in a different storage tank there would be a sufficient identification, although it could not be said which 430 tons declared for Sunderland was any particular 430 tons as that quantity lay in the ocean steamer. From a business point of view I am told it is impracticable to have a separate range of tanks varying in size for each ocean steamer as she comes in; but I do not think it would be commercially impracticable to keep the oil which is brought in for transhipment, whether in one or more ocean steamers, separate from the oil which is brought in for distribution in London. The defendants say that even if that were done it would not satisfy the Act, because there would be in the same tank oil brought in by the *Narragansett* and oil brought in by another steamer, and when, for example, 430 tons were loaded on the *Tioga* for Sunderland it could not be said whether it came from the *Narragansett* or the other steamer,

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

Pickford J.

the whole of the oil having been mixed together. Mr. Macmorran for the plaintiffs says that the defendants cannot say the oil did not come from the *Narragansett's* cargo. That, however, is not a good answer, as it is for the plaintiffs to bring themselves within the exemption; but in my opinion this question must be looked at as a matter of business, and if it is found that the oil which is declared for transhipment is put into a range of tanks and kept quite separate from that which is intended for distribution in London and the plaintiffs can shew that this has been certified or declared in the proper way as intended for transhipment only, and if they can shew that it was transhipped in fact as soon as practicable, I think they bring themselves within the exemption. I cannot think that it is necessary to be able to identify each particular parcel as having come from a particular ship if as a matter of fact the whole has been intended and declared for transhipment and has in fact been transhipped.

The case where the oil intended for transhipment has been mixed with that intended for distribution in London is more difficult. In that case the defendants say they cannot tell that the oil sent out is the oil which was brought in for transhipment. I feel considerable doubt about this point, but I am inclined to think that in that case also the oil is entitled to exemption. If the plaintiffs can shew that the *Narragansett* brought in 650 tons for transhipment only, that they have certified it for transhipment, and that 650 tons have gone from the tank containing that and some other oil, I think that is sufficient proof that it has been brought in for transhipment only and has been transhipped. As I have said, I feel great doubt about this point, and unless there are serious commercial difficulties in the way it seems to me that the plaintiffs would be on much firmer ground if they kept the transhipment oil separate from the oil intended for distribution.

Another point has been raised, namely, whether, as regards some of the oil, it was transhipped as soon as practicable. As to this I am not quite sure whether I have the facts quite clearly before me. It seems to me, however, that the expression "as soon as practicable" must mean in the ordinary course of

navigation, and that it does not mean as soon as practicable for the convenience of the merchant's business. If the merchant has a steamer available to carry a cargo of oil and does not use her for that oil, but uses her to carry other oil to some other place, and so delays the transhipment of the particular cargo, it seems to me that he is not shipping it as soon as practicable; he is not bringing and keeping the oil for transhipment only; he is storing it in London and using the appliances of the port not for the purpose of transhipping the oil, but is keeping it for distribution not in London but for other places for his own convenience. There is one instance referred to by the defendants which looks as if the oil had not been shipped as soon as practicable. But I am not deciding this; I am only taking it as an instance. On April 11 instructions were given to the plaintiffs' superintendent at Purfleet to deliver to the *Tioga* for conveyance to Plymouth 250 tons of oil ex the *Narragansett* and 430 tons of oil out of the ordinary stock for conveyance to Avonmouth. There were 650 tons intended for Plymouth, and if the *Tioga* were available to carry the whole 650 tons and, instead of using her for doing so, the plaintiffs, for their own convenience, filled up two-thirds of her capacity with ordinary stock for Avonmouth, I do not think they reshipped the oil for Plymouth as soon as practicable; but if, on the other hand, it was a case where there happened to be just space for 250 tons and no more, and the plaintiffs took advantage of that in order to send off the *Narragansett* oil, it would be reshipped as soon as practicable; but it looks to me very much as if the plaintiffs had said "We want 650 tons at Plymouth and we want a considerable quantity at Avonmouth; we could take the 650 tons to Plymouth in this ship, but we do not propose to do so as it is more convenient for us to take some oil in the same ship to Avonmouth and postpone delivering the balance at Plymouth for some time." That to my mind is not reshipping the oil as soon as practicable. It must be a question in each particular case, and I can only say that the expression "as soon as practicable" means as soon as practicable in the course of navigation and having regard to the facilities of the port, and not as soon as practicable with regard to the convenience

1913

ANGLO-AMERICAN OIL COMPANY, LIMITED v. PORT OF LONDON AUTHORITY.

of the merchant's business. There will be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Piesse & Sons.*

Solicitors for defendants: *E. F. Turner & Sons.*

J. S. H.

1913

Oct. 22.

ATKINS *v.* AGAR.

Licensing Acts—Closing Hours—Guest of Lodger—Using Licensed Premises for Purpose of obtaining Liquor—Guest unlawfully on Licensed Premises—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 62, *sub-s.* 1.

A lodger at an hotel invited the appellant, who was his cousin and was not lodging in the hotel, to come with him into the hotel after closing hours in order to have a drink, as it was a cold night and he was leaving the hotel the next morning. The appellant entered the hotel and was supplied with intoxicating liquor on the order, and at the expense, of the lodger. Upon an information charging the appellant, under s. 62, sub-s. 1, of the Licensing (Consolidation) Act, 1910, with being unlawfully on the licensed premises at a time when they were required by law to be closed:—

Held, that the justices were entitled to find that the appellant entered and was upon the licensed premises at the invitation of the lodger for the purpose of obtaining intoxicating liquor and that he was unlawfully on the premises and was liable to be convicted under s. 62, sub-s. 1, of the Act.

For the purposes of s. 62, sub-s. 1, of the Act there is no distinction between the position of a lodger on the licensed premises and a bona fide traveller.

Pine v. *Barnes* (1887) 20 Q. B. D. 221, distinguished.

Jones v. *Jones* [1910] 2 K. B. 262, followed.

CASE stated by justices for the county of Leicester sitting at Loughborough.

On February 17, 1913, an information was preferred by the respondent, a superintendent of police, under s. 62 of the Licensing (Consolidation) Act, 1910 (1), against the appellant

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 62, sub-s. 1: "If, during any period during which any premises are required under the provisions of this Act to be closed, any person is

Frank R. L. Atkins for that he was found unlawfully on the licensed premises of one Taylor after closing hours.

At the hearing of the information the following facts were found by the justices:—

The appellant resided at Loughborough, and on Sunday, February 16, 1913, he entertained certain guests at his house, including, among others, his cousin Frank Atkins, who resided in London, but who was a lodger at the King's Head Hotel, Loughborough, from February 14 to the morning of February 17, 1913.

On the evening of February 16 the appellant and his friends went for a motor drive, and on their return to Loughborough they went to the King's Head Hotel, arriving there about 10.40 P.M.

The King's Head Hotel was licensed for the sale of intoxicating liquors by retail, and was required by law to be closed between the hours of 10 P.M. on Sunday, February 16, and 6 A.M. on February 17, 1913.

Before entering the hotel the said Frank Atkins, knowing that the hotel was required by law to be closed on Sundays at 10 P.M., invited the appellant and his guests to come with him into the hotel to have a drink, as it was a cold night and he was leaving Loughborough the next morning. The appellant, his wife, and his friends then entered the hotel, and the said Frank Atkins ordered intoxicating liquors for all the party except the appellant's wife. The liquors were supplied by Taylor, the licensee, and were charged by him to the said Frank Atkins and subsequently were paid for by him.

At 11.30 P.M. two police constables entered the hotel and found the appellant and the others there. The appellant was at the time drinking whisky. When asked by the police officers for an explanation of the presence of those people on the premises at

---

found on those premises, he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on the premises, or a bona fide traveller, or that otherwise his presence on the premises was not in contravention of the provisions of this Act with respect to closing hours, be liable in respect of each offence to a fine not exceeding forty shillings."

1913

ATKINS v. AGAR.

that time of night, Taylor, the licensee, said, pointing to the said Frank Atkins, "This is Dr. Atkins' cousin, he has been staying at the hotel since Friday last; the others are his guests; they have been out for a drive in my car and when they came in I told him (meaning the said Frank Atkins) that before I could supply him with anything to drink he must say they were his guests." Taylor further stated that the said Frank Atkins had so informed him, whereupon he then supplied them with drinks.

The justices decided that the appellant had entered, and was upon, the licensed premises at the invitation of the said Frank Atkins for the purpose of obtaining intoxicating liquor, and, further, that the appellant had not discharged the onus cast upon him by s. 62, sub-s. 1, of the Licensing (Consolidation) Act, 1910, of satisfying them that his presence was not in contravention of the provisions of that Act with respect to closing hours. The justices were therefore of opinion that the appellant was found unlawfully on the said licensed premises at the time in question, and they accordingly convicted him.

The question for the opinion of the Court was whether on the facts above stated the appellant was guilty of the offence alleged against him.

H. Maddocks, for the appellant. The justices drew a wrong inference from the facts. The appellant was invited to the hotel by his cousin, who was a bona fide lodger there and was leaving the next morning, and it was wrong to assume that he accepted the invitation solely for the purpose of getting drink. The parties being relations the proper inference was that the appellant's dominant motive was to enjoy his cousin's conversation. A lodger at licensed premises is entitled to entertain his guests there and to supply them with intoxicating liquor after closing hours: *Pine* v. *Barnes* (1); *Cope* v. *Landles*. (2) These cases are direct authorities in favour of the present appellant's contention. With reference to the case of *Jones* v. *Jones* (3) it is not reconcilable with the previous cases, and was wrongly decided, or it can be distinguished on the ground that what was there done was

(1) 20 Q. B. D. 221. (2) (1896) 13 Times L. R. 18.
(3) [1910] 2 K. B. 262.

really a sham and that the sole motive of the appellant in that case was to get drink. That case, moreover, had reference to the right of a bona fide traveller to supply liquor during closing hours to his guest.

[RIDLEY J. No distinction can be drawn for the purposes of s. 62, sub-s. 1, between a bona fide traveller and a lodger.]

A bona fide traveller has different rights from those of a lodger. Thus, in the case of a six days' licence a bona fide traveller cannot be served with intoxicating liquor, whereas a lodger on the premises is entitled to be served.

[SCRUTTON J. Is not the question of the lawfulness or unlawfulness of the appellant's presence on the premises entirely for the justices? They have to be satisfied under the section.]

The appellant must, no doubt, satisfy the justices of the lawfulness of his reason for being on the licensed premises, but they have in this case set out all the facts, and the question is whether they have drawn the correct inference from them. It is submitted that they have drawn a wrong inference.

Sir Ryland Adkins, for the respondent, was not called upon.

RIDLEY J. This is an appeal against a conviction under s. 62, sub-s. 1, of the Licensing (Consolidation) Act, 1910, by virtue of which it lies upon the person charged to satisfy the justices that he was an inmate, servant, or a lodger on the premises, or a bona fide traveller, or that otherwise his presence on the premises was not in contravention of the provisions of the Act with respect to closing hours. It is for the justices to arrive at a conclusion upon that question, of course in accordance with such principles of law as have been laid down by this Court.

In the present case the facts are that there was a lodger at the King's Head Hotel, Loughborough, who with his friends, including the appellant, had been out in a motor car on Sunday evening, February 16. They arrived back after closing hours, and the lodger invited the appellant and the others to come into the hotel to have a drink. When they got inside some conversation took place, apparently in the presence of them all, in which the licensee said to the lodger that before any drink could be supplied the lodger must say that the others were his guests.

1913

ATKINS v. AGAR.

Ridley J.

Drink was then supplied which was charged to and paid for by the lodger.

The question now is whether the appellant and the others were the lodger's guests. If, as a matter of fact, they were his guests—if that is the conclusion at which the justices ought to have arrived—then the presence of the appellant on the premises would not have been in contravention of the provisions of the Act, but, as I have already said, it was for the appellant to make out to the satisfaction of the justices that he was the lodger's invited guest, really entertained by him, and not merely that he said he was the lodger's guest so as to obtain drink after closing hours.

With regard to the authorities that have been cited, I think *Pine* v. *Barnes* (1) is distinguishable from the present case. There a lodger at an inn had given a dinner party at a time when the inn was open, but the party continued till after closing hours. At and after the dinner, and after closing hours, intoxicating liquors were supplied to, and consumed by, the lodger and his guests. The question was whether the innkeeper was guilty of allowing intoxicating liquors to be consumed on his premises after closing hours, and it was held that he was not liable to be convicted. That case is clearly different in its inception and in the circumstances under which it arose from the present case. In this case there was no previous dinner; there was simply the arrival at the hotel after closing hours and an invitation by the lodger to the appellant to enter and have a drink. In the case of *Jones* v. *Jones* (2), which Mr. Maddocks sought to distinguish, the question arose as to the guests of a bona fide traveller. I cannot for this purpose distinguish the case of a bona fide traveller from the case of a lodger. In s. 62, sub-s. 1, they are treated as if there was no distinction between them, and I think the two are on precisely the same footing for the purposes of that section. In *Jones* v. *Jones* (2) a bona fide traveller invited the appellant to come with him into certain licensed premises as his guest for the purpose of getting something to drink at a time when the premises were required to be closed. There Lord Alverstone C.J. said (at p. 267): "But the only

(1) 20 Q. B. D. 221. (2) [1910] 2 K. B. 262.

construction which I can place upon the finding of the justices is that Vaughton invited the appellant to go into the inn for the sole purpose of having something to drink, because they state that Vaughton met the appellant in Towyn, and their respective residences being in the same direction Vaughton invited the appellant to drive with him in his motor car, and on their arrival at the inn Vaughton invited the appellant to come into the inn as his guest, and ordered and paid for the whisky, and was bona fide entertaining the appellant as his guest in the belief that he could lawfully do so. I understand that to mean that the appellant went into the inn upon the invitation of a bona fide traveller for the purpose of obtaining intoxicating liquor which was to be ordered and paid for by the bona fide traveller. In my opinion the appellant's presence on the premises was in these circumstances in contravention of s. 25 of the Licensing Act, 1872, inasmuch as he was there for the mere purpose of obtaining the liquor under colour of the right of the bona fide traveller to order and pay for intoxicating liquor. This being the ground upon which I base my decision, it does not touch the broader question as to the right of a bona fide traveller when in the inn to entertain a friend, to which I have referred above." With regard to the case of a bona fide traveller the question may remain open as Lord Alverstone C.J. left it, but he there considered that the justices were right in finding that the appellant was not on the premises otherwise than in contravention of the provisions of the Act. As I have said, it is for the justices to find this, but under circumstances which cannot be distinguished from those in *Jones* v. *Jones* (1), it is impossible to say that their finding in this case was wrong. The appeal will therefore be dismissed.

SCRUTTON J. I agree.

BAILHACHE J. I agree. In all these cases the question is, what was the purpose for which the person accused was upon the licensed premises? If he was there spending the evening at dinner with, or being entertained by, the lodger, and if in the

(1) [1910] 2 K. B. 262.

1913

ATKINS v. AGAR.

Bailhache J.

course of spending the evening, and as an incident to that, intoxicating liquor was supplied after hours, he comes within the principle of the decisions in *Pine* v. *Barnes* (1) and *Cope* v. *Landles*. (2) If, on the other hand, the accused has gone to the licensed premises after closing hours, not to dine or have supper with, or to be entertained by, the lodger, but for the express purpose of getting drink, he comes within the decision of *Jones* v. *Jones*. (3) I think the present case comes within the latter class.

Appeal dismissed.

Solicitors for appellant: *Indermaur & Brown, for Clifford & Cliffords, Loughborough.*

Solicitors for respondent: *Field, Roscoe & Co., for Moss & Taylor, Loughborough.*

J. S. H.

1913

Oct. 22.

THE KING *v.* THOMAS AND ANOTHER. *Ex parte* O'HARE.

Justices—Jurisdiction—Court consisting of Stipendiary Magistrate and another Justice of the Peace—Magistrates differing in Opinion—Stipendiary Magistrate adjudicating alone—Acquiescence by Second Magistrate.

The applicant was summoned before a Court of summary jurisdiction for a contravention of the Pawnbrokers Act, 1872. The Court consisted of the stipendiary magistrate for the district and another justice of the peace. At the conclusion of the evidence the second justice, in a private discussion of the case with the stipendiary magistrate, said that the evidence was not in his view such as would justify a conviction. The stipendiary magistrate, being satisfied that the case was fully made out against the applicant, stated his view to the second justice and added the following words: "I must then take upon myself the burden of adjudicating in this case alone." The second justice said "Very well," whereupon the stipendiary magistrate ordered the applicant to pay a fine and costs, adding that he alone was responsible for the decision and that the second justice was not in any way a party thereto:—

Held, that as the stipendiary magistrate had jurisdiction to decide the

---

(1) 20 Q. B. D. 221. (2) 13 Times L. R. 18.
(3) [1910] 2 K. B. 262.

1913

REX v. THOMAS. O'HARE, *Ex parte.*

case by himself, and that as what took place amounted to a withdrawa by the second justice from taking any part in the decision, the conviction of the applicant by the stipendiary magistrate alone was valid.

RULE NISI to justices to shew cause why they should not state a case for the opinion of the Court.

The applicant for the rule, O'Hare, was summoned before a Court of summary jurisdiction sitting at the Porth Police Court, in the county of Glamorgan, under s. 32 of the Pawnbrokers Act, 1872, for unlawfully taking an article in pawn from a certain person appearing to be intoxicated.

The said Court of summary jurisdiction consisted of the stipendiary magistrate for the petty sessional division of Pontypridd and another justice of the peace for the county of Glamorgan.

O'Hare pleaded not guilty, and evidence was given both for the prosecution and for the defence. At the conclusion of the hearing the stipendiary magistrate ordered O'Hare to pay a fine of 10*s.* and the costs of the proceedings.

According to O'Hare's affidavit, filed in support of the rule, it appeared that the stipendiary magistrate and the other justice of the peace differed in opinion as to whether there should be a conviction, and that the stipendiary magistrate stated that in giving his decision he was not able to carry his colleague with him. O'Hare's solicitor thereupon urged that, as the justices were equally divided, O'Hare could not legally be convicted by one of them only, and that the proper course was either to dismiss the summons or to adjourn it, in order that it might be reheard before a Court differently constituted. The stipendiary magistrate refused to take either of those courses but convicted O'Hare, and refused to state a case; whereupon O'Hare obtained this rule.

The stipendiary magistrate filed an affidavit in which he stated that, after the case had been fully heard, the justice who was sitting with him on the bench said in the course of a private discussion of the case that the evidence was not in his view such as to justify the conviction of O'Hare; that thereupon he (the stipendiary magistrate), being satisfied that the case was fully made out, stated his view to the other justice of the peace and

1913

REX v. THOMAS. O'HARE, *Ex parte.*

added the following words: "I must then take upon myself the burden of adjudicating in this case alone," or "I shall have to adjudicate in this case alone," or other words to the like effect; that to this the other justice of the peace assented, saying "Very well," or words to the like effect; that thereupon the stipendiary magistrate proceeded to pronounce his decision, adding that he alone was responsible for it, and that the other justice of the peace was not in any way a party thereto; that, beyond the expression of his opinion privately to the stipendiary magistrate, the other justice of the peace did not at any time give any decision in the case, or make any public statement or announcement from the bench with reference thereto.

No affidavit was filed by the second justice.

No counsel appeared to shew cause.

C. L. Attenborough, in support of the rule. Although the stipendiary magistrate could have sat alone and adjudicated on this case, nevertheless, as the Court was constituted of two justices, the applicant was entitled to have the decision of the two justices. It was not competent for the second justice to withdraw his judgment as he is said to have done.

[RIDLEY J. It is common practice in a Divisional Court consisting of two judges for the junior judge to withdraw his judgment if the two differ in opinion. That was done, for instance, in *Smith* v. *Richmond*. (1)]

That course is followed to enable an appeal to be brought. The proceedings before the justices were, however, of a criminal nature in which there was no appeal. Moreover, there is no affidavit from the second justice, and the rule ought, therefore, to be made absolute for a case to be stated setting out all the facts.

RIDLEY J. This rule must be discharged. When it appeared that the two justices differed in opinion the stipendiary magistrate said "I must then take upon myself the burden of adjudicating in this case alone," whereupon the second justice said "Very well." In a case like this, where the stipendiary magistrate

(1) [1898] 1 Q. B. 683; and see *Metropolitan Water Board* v. *Johnson*, [1913] 3 K. B. at p. 904.

had jurisdiction by himself, it must be taken that what took place amounted to a withdrawal by the second justice from having anything to do with the decision; in other words, an assent by him to the stipendiary magistrate adjudicating alone. In these circumstances I am of opinion that the stipendiary magistrate had jurisdiction to decide the case alone.

1913

REX v. THOMAS. O'HARE, *Ex parte.*

SCRUTTON and BAILHACHE JJ. concurred.

Rule discharged.

Solicitors for applicant: *Attenborough & Sons.*

J. S. H.

WILLIAMS, APPELLANT *v.* GOSDEN, RESPONDENT.

1913 *Oct.* 15.

Shop—Weekly Half-Holiday—Exemptions—"Sale of motor, cycle, and aircraft supplies and accessories to travellers"—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *s.* 4; *Sched. II.*

Sect. 4, sub-s. 2, and Sched. II. of the Shops Act, 1912, exempt from the obligation to close for a weekly half-holiday any shop in which the only trade or business carried on is that of "the sale of motor, cycle and aircraft supplies and accessories to travellers."

The respondent, who carried on at a shop the business of a saddler and harness maker, but did not deal in or sell supplies and accessories to travellers by motor, cycle, or aircraft, claimed to come within the above exemption:—

Held, that the exemption applies only to the sale of supplies and accessories for motors, cycles, and aircraft to travellers, and therefore the respondent did not come within the exemption.

CASE stated by justices.

Two informations were preferred at petty sessions by the appellant against the respondent under the Shops Act, 1912 (1),

(1) 2 & 3 Geo. 5, c. 3, s. 4: "(1.) Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week.

"(3.) Unless and until such an order is made affecting a shop, the weekly half-holiday as respects the shop shall be such day as the occupier may specify in a notice affixed in the shop, but it shall not be lawful for the occupier of the shop to change the day oftener than once in any period of three months.

"(6.) This section shall not apply

1913

WILLIAMS v. GOSDEN.

the one for not having closed his shop not later than 1 o'clock in the afternoon of one weekday in a particular week, and the other for not affixing in his shop a notice specifying the day on which the shop would be closed for the weekly half-holiday. The justices dismissed both informations, which were by agreement heard together, and stated a case for the opinion of the Court.

The following facts were proved and admitted before the justices. The appellant was inspector for the purposes of the Shops Act, 1912, and was duly authorized to take proceedings under the provisions of the Act against the respondent. The respondent carried on the business of a saddler and harness maker at a shop in Midhurst. That shop was not closed for the serving of customers not later than 1 o'clock in the afternoon of one weekday in the week between midnight on Saturday night, January 18, 1913, and ending on the succeeding Saturday night. On January 28, 1913, the respondent did not affix in the said shop a notice specifying the day on which the shop would be closed for the weekly half-holiday.

On behalf of the respondent it was contended that no offences had been committed within the meaning of the Act upon the ground that his shop (that of a saddler and harness maker) came within paragraph 3 relating to trades and businesses exempted from the provisions as to weekly half-holidays set out in the Second Schedule of the Shops Act, 1912, as being a shop for the sale of supplies and accessories to travellers, and that that exemption applied to all shops selling supplies and accessories to all travellers. It was not attempted to be shewn on behalf of the respondent that he dealt in or sold supplies and accessories to travellers by motor cycle and aircraft. On behalf of the appellant it was contended that the words "supplies and accessories to travellers" applied only to such supplies and accessories as were necessary

---

to any shop in which the only trade or business carried on is trade or business of any of the classes mentioned in the Second Schedule to this Act . . . ."

"Second Schedule. Trades and businesses exempted from the provisions as to weekly half-holiday.

. . . . .

"The sale of motor, cycle, and aircraft supplies and accessories to travellers."

for and appurtenant to motors, cycles, and aircraft, and that consequently a saddler's and harness maker's shop not dealing in such supplies and accessories did not come within the exemption.

The justices were of opinion that the exemption contained in the schedule referred to all supplies and accessories to travellers whether by motor cycles and aircraft or not, and that the trade or business of a saddler or harness maker selling supplies and accessories to travellers came within the exemption in the said schedule, and dismissed both informations.

J. Newington (*J. E. Raven* with him), for the appellant.

The respondent did not appear.

RIDLEY J. We are all of opinion that the decision of the justices was wrong. They held that the words in the Second Schedule to the Shops Act, 1912, include all supplies and accessories to travellers, whether by motor, cycle, or aircraft or not, and that the trade or business of a saddler or harness maker selling supplies and accessories to travellers came within the exemption. We think that that is not the proper meaning of this provision, and that it applies only to the sale of supplies and accessories for motors, cycles, and aircraft to travellers, and not to the sale of supplies and accessories for other travellers. The appeal must be allowed, and the case must be remitted to the justices to convict upon both informations.

SCRUTTON and BAILHACHE JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Stow, Preston & Lyttelton, for Rawlinson & Butler, Horsham.*

J. H. W.

1913
Oct. 17.

LAMBERT *v.* ROWE.

Market—Tollable Goods—Contract of Sale made beyond Market Limits—Delivery within Limits—Property not passing till Delivery—Whether Toll payable—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.

By s. 13 of the Markets and Fairs Clauses Act, 1847, any person who shall "sell" tollable articles at any place within the prescribed limits of a market except in his own dwelling place or shop is guilty of an offence.

A farmer at his own dwelling-house agreed to sell to a butcher two specific pigs at a certain price per score. By the terms of the contract the pigs were to be killed and delivered by the seller, and were to be at his risk until delivery. A few days later he killed and delivered the pigs at the purchaser's shop, which was within the market limits. Dead pigs were tollable articles:—

Held that the word "sell" in s. 13 is to be understood in a popular and not its strict legal sense; that for the purposes of that section the pigs were sold where the agreement was made, notwithstanding that the property did not then pass; and that the seller had consequently not committed an offence within the section.

Case stated by justices of Devon.

The appellant was summoned under s. 13 of the Markets and Fairs Clauses Act, 1847, for that he on December 13, 1912, not being then a licensed hawker, sold within the prescribed limits of the Ilfracombe urban district, but not within his own dwelling place or shop, two carcases of pigs in respect of which toll was authorized to be taken. Upon the hearing of the summons the following facts were proved or admitted:—

The market place of the town of Ilfracombe is provided and regulated by the urban district council under the powers conferred by the Public Health Act, 1875. That Act incorporated the provisions of the Markets and Fairs Clauses Act, 1847, by s. 13 of which "After the market place is opened for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market" shall be liable to a penalty. In the case of a market provided by a district council the words "prescribed limits" mean the area

1913

LAMBERT v. ROWE.

of the district. By the council's by-laws it was provided that the market should be open on every weekday.

On December 13 the appellant, who is a farmer living at Middle Campscott Farm, within the prescribed limits of the town of Ilfracombe, delivered to one Trebble, a butcher, at his shop, which is situate within the said limits, two carcases of pigs which are tollable articles, in pursuance of a contract entered into on December 9, 1912, at the appellant's dwelling place between the appellant and Trebble for the sale of the pigs at 10*s.* 6*d.* per score. It was part of the contract that the appellant should kill and deliver the pigs, and that they should be at the appellant's risk until delivered. At the time of delivery on December 13, when the pigs were weighed, the market was open. Toll was demanded of the appellant by the agent of the lessee of the market, which the appellant refused to pay.

It was contended for the appellant that the sale took place at the appellant's dwelling place and not at Trebble's shop. The justices were of opinion that the sale was not effected until the carcases were delivered at the purchaser's shop, and they accordingly convicted the appellant.

Sydney Goodman, for the appellant. The justices proceeded upon the mistaken assumption that there can be no "sale" for the purposes of s. 13 of the Markets and Fairs Clauses Act until the contract of sale is completed by the passing of the property, and that as the property did not pass until the carcases were delivered and weighed and the price ascertained the sale took place then and not before. The word "sell" in that section is to be understood in a popular sense and not in the sense in which it is used in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). It is enough if there is an agreement to sell, if the subject-matter of the agreement consists, as here, of specific goods, and probably also even if the subject-matter is at the time of the agreement unascertained. In *Bourne* v. *Lowndes* (1) the facts were almost identical with those in the present case. A farmer residing at a considerable distance from a market town contracted at his residence to sell a number of pigs and

(1) (1858) 22 J. P. 354.

1913

LAMBERT v. ROWE.

kill and deliver them at the purchaser's shop within the market limits, and he subsequently delivered them there. On those facts the Court, without calling on the appellant, held that a conviction of the farmer under s. 13 must be quashed. No formal judgment was delivered, Lord Campbell contenting himself with saying that the case for the respondent was not arguable. In *Stretch* v. *White* (1), where a farmer, in pursuance of an arrangement entered into outside the market limits, from time to time sent his butter to a grocer's shop within the limits, the grocer paying him the current market price, it was held that there was no sale within the limits within the meaning of the section. Blackburn J. said, "It is not necessary to constitute a sale within the 13th section that there should have been a transmutation of property"; and Wightman J. said, "All that can be said is that there was a delivery within the limits of the market, but the sale was elsewhere." That case was followed by the Irish Court in *Gracey* v. *Banbridge*. (2) There the appellant, having on June 9 agreed within the market limits to sell a quantity of potatoes which at that time were outside the limits, delivered them on June 13 at the purchaser's house, which was within the limits. He was charged with having sold them on June 13 in breach of the provisions of s. 13 of the Act of 1847. It had previously been held in *Newtownards* v. *Woods* (3) that a sale of goods by sample on market day within the prescribed limits is not within that section unless at the time of the bargain the bulk is also within the limits, and it was sought to distinguish that case on the ground that it did not decide that a subsequent delivery of the bulk within the limits was not within the section. But the Court held that the delivery and acceptance on June 13 were not the sale, but were the completion of a previous contract. So far the authorities are in accord in the appellant's favour. There are two cases, however, which appear to conflict with them. In *Exeter Corporation* v. *Heaman* (4) the respondent was charged under a private market Act with having sold meat within the limits of a market town elsewhere than in the market. It was proved that he

(1) (1861) 25 J. P. 485.
(2) [1905] 2 I. R. 209.
(3) (1877) I. R. 11 C. L. 506.
(4) (1877) 37 L. T. 534.

entered into a contract on January 5 at a butcher's shop in the town to sell and deliver the meat in question there, and he so delivered it on January 12. He was summoned in respect of a sale on January 12. The justices dismissed the information on the ground that the sale was complete on January 5. On appeal the Court reversed their decision. Lindley J. went on the ground that in any view the respondent had committed an offence on one day or the other, for the agreement as well as the delivery was within the limits, and that if the justices were right, which he thought they were, in holding that the sale took place on the earlier date, they ought to have amended the summons. But Grove J. went on a different ground. He said: "I think there was an infraction of it" (the Act) "on the 12th when the price was ascertained and the meat delivered and the price paid within the city and not in the market; because until the weighing and delivering of the meat the whole transaction was inchoate and incomplete." It is to be observed, however, that no counsel appeared for the respondent, and that the attention of the Court was not called to the above-mentioned decisions. That case was followed in *Torquay Market Co.* v. *Burridge*. (1) There a greengrocer living within the limits of a market town used to order vegetables from the respondent, a farmer living outside the limits, and the respondent delivered the goods at the greengrocer's shop. The respondent was charged under a section of a local Act the provisions of which were similar to those of s. 13 of the Markets and Fairs Clauses Act. The Court held on the authority of *Exeter Corporation* v. *Heaman* (2) that he ought to have been convicted. Day J., however, expressed regret at being obliged to come to that decision, and pointed out that if the farmer who supplies the goods to one who is not a shopkeeper has to pay toll, and then the purchaser pays toll for selling in the market, the goods will pay toll twice over.

Daldy, for the respondent. The word "sell" in s. 13 must be understood in its ordinary legal sense. In that sense it is distinguished from an executory agreement to sell by reason of its involving a transfer of the property to the buyer. It is essential

(1) (1883) 48 J. P. 71. (2) 37 L. T. 534.

1913

LAMBERT v. ROWE.

to constitute a sale that the property should pass. And as here the pigs had by the terms of the contract to be killed by the seller and delivered, and the carcases had to be weighed before the price could be ascertained, until all those things were done there was no sale. Therefore an essential part of the sale took place within the prescribed limits, and the appellant consequently committed an offence within the section. The principal authority against the respondent's contention is the case of *Stretch* v. *White*. (1) But that case is distinguishable on the ground taken by Wills J. in *Pletts* v. *Campbell*. (2) There a brewer having an off-licence for the sale of beer by retail used to deliver from a cart jars of beer at his customers' houses in pursuance of orders previously given, there being at the time the cart left the licensed premises nothing to shew that any particular jar had been appropriated to any particular customer. It was held that as until delivery the goods were unappropriated the sale took place at the customers' houses, and the brewer was consequently liable to a penalty under s. 3 of the Licensing Act, 1872, for selling elsewhere than at the licensed premises. Wills J. said: "We have been pressed with the case of *Stretch* v. *White* (1) . . . . As to that decision there seems to have been very good evidence that the sale was complete by transmutation of the property when the whole of the butter was manufactured and set aside for delivery (3); and if that is so the case does not stand in our way." In other words the dictum of Blackburn J. was only obiter. From its being thought necessary to distinguish *Stretch* v. *White* (1) the Court in *Pletts* v. *Campbell* (2) must have assumed that the word "sell" had the same meaning in the Markets and Fairs Clauses Act as in the Licensing Act; and shortly afterwards in *Pletts* v. *Beattie* (4), where the facts were similar except that the brewer before his cart left the licensed premises labelled particular bottles with the customers' names, and that the orders previously given by the

(1) 25 J. P. 485.

(2) [1895] 2 Q. B. 229.

(3) So far as appears from the report of *Stretch* v. *White* there was no evidence that the farmer contracted to sell the grocer all his butter. The evidence of the purchaser was "I said I would take all the butter he could send me. He said 'Very well.'"

(4) [1896] 1 Q. B. 519.

customers contained assents by them to such appropriation, the Court held that the sale took place on the licensed premises. It is submitted that the two cases in the Irish Courts were wrongly decided. In *Gracey* v. *Banbridge* (1) it was argued that *Exeter Corporation* v. *Heaman* (2) was distinguishable on the ground that it arose upon a special Act which provided that the delivery of any goods made chargeable with toll upon their sale should in all cases be evidence of their sale; and the Court apparently accepted that distinction, Gibson J. saying, "The *Exeter Case* (2) and the *Torquay Case* (3), deciding that a sale under an antecedent contract may be deemed to have taken place on the day of delivery, and to make the seller liable to toll, were decided on special statutes," while Madden J. said, "The exact terms of the latter Act"—the Torquay Market Act—"are not set out in the short note of the case in the Justice of the Peace. But as the decision in the *Exeter Case* (2) was reluctantly followed in the *Torquay Case* (3) on the ground that the two cases were undistinguishable, I conclude that the Acts were similar in their terms. The 11th section of the Exeter Act provided that delivery of any tollable goods should in all cases be evidence of the sale of the goods. The Court, under circumstances similar to those in the present case, held that sufficient took place on the date of delivery to constitute the offence of selling or exposing for sale under the provision of the Exeter Market Act." But that seems to be a misapprehension; the Exeter Act only said that delivery should be evidence of a sale having taken place at some time, not necessarily of its having taken place at the time of the delivery. Therefore the ground of the Court's decision in the *Exeter Case* (2) that the sale took place at the time of delivery must be sought for outside the Act, and must be found in the general law of sale that the sale is not complete until the goods have been delivered and the property transferred. (4)

(1) [1905] 2 I. R. 209.

(2) 37 L. T. 534.

(3) 48 J. P. 71.

(4) The assumption in *Gracey* v. *Banbridge* that the Torquay Market Act, 1855 (18 Vict. c. xxvii.), contained a clause similar to that in the Exeter Market Act as to delivery being evidence of sale is a mistake. There is nothing in the Torquay Act to that effect.

1913

LAMBERT v. ROWE.

RIDLEY J. The appellant was summoned for having sold within the limits of the town of Ilfracombe elsewhere than in his dwelling place or shop, in breach of s. 13 of the Markets and Fairs Clauses Act, 1847, certain articles in respect of which toll was alleged to be payable. It appeared that the appellant was a farmer who on December 13 delivered at the shop of one Trebble, a butcher, within the prescribed limits two carcases of pigs, which were tollable articles, in pursuance of a contract of sale entered into four days before at the appellant's house. The pigs were alive when the contract was made, and by the terms of the contract the appellant was to kill and deliver them at Trebble's shop, they were to be at the appellant's risk until delivery, and the price was to depend upon the weight. On those facts the justices found that the sale took place at Trebble's shop, and not at the appellant's house. They were of opinion that a sale within s. 13 meant a completed sale, one under which the property in the goods passes to the purchaser. But in our opinion that view is wrong. This question arises upon an Act of Parliament the use of the word "sell" in which is, according to previous decisions, not to be construed with reference to the niceties of the law of contract of sale, or to the distinction between a sale and an agreement to sell, or to the question whether the property in the goods has passed, but is to be understood in a popular sense; and although if a lawyer were asked where the sale of these pigs took place he might say that in the legal sense it took place at the butcher's shop because until they were delivered there and weighed the sale was not complete, any ordinary person, not a lawyer, who was asked the same question would unhesitatingly say that the sale took place on December 9 at the farmhouse. Similarly in the *Newtownards Case* (1) any ordinary man would have said that the sale of the corn took place on the day when the sample was produced and the bargain struck. And the decision of the Court there proceeded upon the assumption that that is the sense in which the word "sell" is used in the Markets and Fairs Clauses Act, for they held that in order to bring a sale within s. 13 the bulk of the goods sold must be within the

(1) I. R. 11 C. L. 506.

1913

LAMBERT v. ROWE.

Ridley J.

prescribed limits at the time of the sale, and that as the bulk of the corn was outside the limits at the time when the agreement was made the respondent was not within the section. Though I am not prepared to say whether I agree with the judges in that case as to the necessity of the bulk being within the limits at the time of the sale, it is clearly an authority that the agreement and not the delivery fixes the time when the sale is made. Turning to the English decisions I think the case of *Stretch* v. *White* (1), following an earlier decision of *Bourne* v. *Lowndes* (2), remains an authority to the present day. There a farmer living outside the limits of a town sent his butter to a grocer's shop within the limits in pursuance of an agreement made by the grocer at the farmer's house to take any butter he sent him at the market price. It was contended there as here that there was no sale until delivery, and that therefore the butter was chargeable with toll. But the Court held that that was not so, and that a general contract to supply butter was a sufficient sale. "It is not necessary" said Blackburn J. "to constitute a sale within the 13th section that there should have been a transmutation of property." No formal judgment was apparently given by the Court, but the grounds of the decision are sufficiently clear from what fell from the judges in the course of argument. With regard to the cases of *Exeter Corporation* v. *Heaman* (3) and *Torquay Market Co.* v. *Burridge* (4) it is sufficient to distinguish them to say that in the former the local Act provided that delivery of the goods was to be evidence of a sale, and it is to be assumed with regard to the latter that the Torquay Act contained a similar provision, because when the *Exeter Case* (3) was quoted the Court said it was undistinguishable. If, however, there was no such provision in that Act all I can say is that the *Torquay Case* (4) must be regarded as unreliable. It is I think necessary that I should refer to the case of *Pletts* v. *Campbell.* (5) That was a case under the Licensing Act, 1872, and the question was where the sale of certain beer had taken place. There the brewer having received orders

(1) 25 J. P. 485.
(2) 22 J. P. 354.
(3) 37 L. T. 534.
(4) 48 J. P. 71.
(5) [1895] 2 Q. B. 229.

1913

LAMBERT v. ROWE.

Ridley J.

from several customers for beer sent out a cart from the licensed premises with sufficient bottles of beer to satisfy all the orders, but omitted to appropriate particular bottles to a particular order before the beer left the licensed premises. It was held that there could be no sale so long as it was uncertain to what articles the contract applied, and that, as the appropriation did not take place until the cart reached the customer's house, the brewer was properly convicted of selling elsewhere than on the licensed premises. But at the same time Wright J., who concurred in the decision, said, "I think it is going too far to say that the word 'sell' must necessarily mean a sale in the legal sense; it may be satisfied by an agreement to sell, of which *Stretch* v. *White* (1) is an illustration." The only other case I need refer to is *Gracey* v. *Banbridge* (2), where the facts were similar to those in the *Newtownards Case* (3), and the Court following the decision in that case held that where there was a sale by sample within the market limits of goods then lying outside those limits the subsequent delivery within the limits did not amount to a sale within the meaning of s. 13, because the sale had already taken place when the buyer agreed to purchase. In that case the *Exeter Case* (4) and the *Torquay Case* (5) were cited to the Court and distinguished upon the same ground that I have endeavoured to distinguish them. For the reasons I have given I think that the sale of the pigs took place in the appellant's farmhouse and that the conviction was consequently wrong.

SCRUTTON J. The 13th section of the Markets and Fairs Clauses Act makes it a penal offence to sell tollable goods within the prescribed limits of a market town elsewhere than in the seller's dwelling-house or shop. There is a market at Ilfracombe, and the appellant, a farmer, at his dwelling-house within the prescribed limits made an agreement to sell two pigs, then alive, which he was to kill and deliver at the buyer's shop within those limits, where they were to be weighed to ascertain the price, and they were to be at the seller's risk until delivery.

(1) 25 J. P. 485.
(2) [1905] 2 I. R. 209.
(3) I. R. 11 C. L. 506.
(4) 37 L. T. 534.
(5) 48 J. P. 71.

1913

LAMBERT v. ROWE.

Scrutton J.

The appellant having delivered the pigs was summoned for selling them at the place where he so delivered them. He contended that the sale took place at his dwelling-house and that he was therefore exempt from liability to toll. The justices were of opinion that in order to determine where the sale took place they ought to apply the ordinary law of the land relating to sales, and applying that law they held that as the property did not pass until certain events happened at the place where the pigs were delivered the sale was there and not at the appellant's dwelling-house, and they thereupon convicted. Now, if I may say so, I respectfully sympathize with the justices who, having correctly applied the ordinary law of the land, have to be told by a higher Court that the ordinary law of the land is not the law which they ought to have applied. If the question were whether there was a sale under the Sale of Goods Act I think the justices were right. That Act draws a distinction, which is much older than the Act itself, between a contract of sale and a sale and says that "where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called 'an agreement to sell,'" and "an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." Here it was a condition of the transfer that the pigs should be killed and delivered at the buyer's shop, and further under s. 18 of the Act the property would not pass until the pigs had been weighed and the buyer had notice of it. The intention was that the weighing should be done at the buyer's shop. Therefore for the purposes of the Sale of Goods Act the sale would have taken place at that shop and not at the appellant's dwelling-house. But there is a series of statements by judges that in interpreting the Markets and Fairs Clauses Act you must not understand the word "sell" in the sense in which it is used in the law of sales. Crompton J. in *Stretch* v. *White* (1) complained that the justices in that case had decided the case on the niceties of the law of

(1) 25 J. P. 485.

1913

LAMBERT v. ROWE.

Scrutton J.

sale, and becoming enchanted by those niceties they were too recondite in their law by far. A similar statement was made by Wright J. in *Pletts* v. *Campbell* (1) and by the judges in the two Irish cases to which we were referred. I feel myself bound therefore to hold that the test is not whether there was a sale under the ordinary law of sale of goods. I think the judges in *Stretch* v. *White* (2) and in the earlier case of *Bourne* v. *Lowndes* (3) intended to say that an agreement for sale is enough if it is such as would popularly be called a sale, and that if you find such an agreement made outside the prescribed limits it is immaterial that the sale is completed by delivery within the limits. Then there are two cases which go the other way, the *Exeter Case* (4) and the *Torquay Case*. (5) In the former of those cases, where, the agreement for sale having been made on January 5, the goods were delivered on January 12, Grove J. held that the seller could be properly charged with a sale on the latter date. And in the *Torquay Case* (5) two judges followed the decision of Grove J., holding that the sale took place where the goods were delivered. In my view those two cases are inconsistent with *Stretch* v. *White* (2) and *Bourne* v. *Lowndes* (3), and consequently subsequent judges have had to distinguish them, and they have done so upon the ground that in the Exeter Act there was a clause that delivery of the goods should be evidence of the sale, and they inferred that that meant, though I can find no suggestion of such a meaning in the clause itself, that delivery was to be evidence of a sale at the place where the goods were delivered; and further they assumed that the Torquay Act contained a similar clause, and they treated the *Torquay Case*(5) as explicable on the same ground. As many judges have accepted that ground of distinction I feel myself bound to follow it. Then the question is what have we to substitute for the accurate definition of sale that is to be found in the Sale of Goods Act? What, for the guidance of justices in future cases, are we to lay down that sale means in the Act before us? All I propose to say is this: I think the cases at

(1) [1895] 2 Q. B. 229.
(2) 25 J. P. 485.
(3) 22 J. P. 354.
(4) 37 L. T. 534.
(5) 48 J. P. 71.

1913

LAMBERT v. ROWE.

Scrutton

present decide that such an agreement for sale as would popularly be called a sale, although the property does not pass by it and although the acts passing the property occur elsewhere, is to be treated as a sale for the purposes of this Act. I think the reasoning of that is that, whereas generally people are assumed to know the law, this Act has been passed upon the supposition that they do not, and that when the Legislature is dealing with farmers and tolls in market towns it forbids them to sell in a sense that they will understand, as when an agreement for a sale is spoken of as a sale, and not in a sense that they never heard of, as when the existence of the sale is made to depend upon minute distinctions about the property passing. It seems to me that that leaves several questions unsettled, as for instance what is to happen where the agreement for sale is within the prescribed limits and the property passes outside those limits, for, speaking for myself, I do not understand the ground upon which the Irish cases were decided, and I must not be understood as accepting the authority of those cases. For these reasons I think the justices in endeavouring to apply the law of the land have applied the wrong law, and that instead of reading the word "sale" in the sense which it bears in the Sale of Goods Act they should have read it in the popular sense that it bears in the minds of farmers. I agree that the appeal should be allowed.

BAILHACHE J. I am of the same opinion. While so agreeing in the result I wish it to be understood that I base my agreement on the case of *Stretch* v. *White* (1), which to my mind is conclusive of the question unless it has been overruled. There are no doubt two English cases which appear to be in conflict with *Stretch* v. *White* (1), the *Exeter Case* (2) and the *Torquay Case*. (3) Those cases have been distinguished by subsequent judges, and I have no wish to quarrel with the reasons that they have given for so distinguishing them, but I should like to point out that in the *Exeter Case* (2) the defendant had made a contract within the market limits on January 5 to sell the goods in question, and in pursuance of that contract had delivered them within the limits

(1) 25 J. P. 485. (2) 37 L. T. 534.
(3) 48 J. P. 71.

KPL LONDON UNIV.

1913

LAMBERT v. ROWE.

Bailhache J.

on January 12. It was therefore perfectly clear that whether the contract or the delivery was to be regarded as the sale, as both took place within the limits, the defendant had committed the offence of selling within the limits, and, the summons having charged him with a sale on January 12, the only question was whether the summons should be amended or not. Under those circumstances one can well understand that the judges, when affirming the conviction, did not pay much attention to the question of the date when the sale took place, as it was not very material that they should do so. It can therefore hardly be regarded as a direct authority that for the purposes of s. 13 the sale takes place when the goods are delivered. However in the *Torquay Case* (1) the judges apparently regarded it as a binding authority to that effect, and reluctantly followed it. It is to be observed that in neither of those cases was the earlier case of *Stretch* v. *White* (2) cited to the Court. If those cases are to be regarded as inconsistent with the earlier case, as I think they are, I prefer the authority of *Stretch* v. *White.* (2) Whether the Irish Courts were right in holding that there can be no breach of s. 13 unless at the time of a contract of sale made within the market limits the goods sold are also present there, it is not necessary for me to say. All I desire to say on the point is that I do not at the moment accept that proposition, and should in any future case in which the question arose require to have it argued. At the present moment the inclination of my mind is that in so holding the Irish Courts have gone beyond what the statute warrants.

Appeal allowed.

Solicitor for appellant: *J. H. Brewer, Barnstaple.*

Solicitors for respondent: *Coad & Cox, for R. M. Rowe, Ilfracombe.*

(1) 48 J. P. 71. (2) 25 J. P. 485.

J. F. C.

WEBSTER, Appellant *v.* TERRY, Respondent. 1913 Oct. 21.

Motor Car—Lamp—Motor Cars (Use and Construction) Order, 1904, *art. II., condition 7 (i.)—Exemption—Bicycle—Motor Cycle.*

The definition of a motor car in art. I. of the Motor Cars (Use and Construction) Order, 1904, is such as to include a motor cycle. By art. II. no person shall use a motor car on a highway unless the conditions thereinafter set forth are satisfied. By condition 7 (i.) the lamp or lamps to be carried by a motor car must be of a certain specified description, "provided that . . . . this condition shall not extend to any bicycle, tricycle, or other machine to which s. 85 of the Local Government Act, 1888, applies":—

Held by Ridley and Bailhache JJ., Scrutton J. dissenting, that a motor cycle is not within the proviso, and is, therefore, bound to comply with condition 7 (i.).

Case stated by justices for the county of Essex.

At a Court of summary jurisdiction sitting at Epping an information was preferred by the respondent Terry under art. II. of the Motor Cars (Use and Construction) Order, 1904 (1),

(1) The Motor Cars (Use and Construction) Order, 1904 (No. 315 of the Statutory Rules and Orders, 1904):—

"Art. I. In this Order— . . . . The expression 'motor car' means a vehicle propelled by mechanical power which is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotive not exceeding in weight unladen four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause.

"Art. II. No person shall cause or permit a motor car to be used on any highway, or shall drive or have charge of a motor car when so used, unless the conditions hereinafter set forth are satisfied; namely,—

. . . . . .

"(7.) (i.) The lamp to be carried attached to the motor car in pursuance of s. 2 of the Act of 1896 shall be so constructed and placed as to exhibit, during the period between one hour after sunset and one hour before sunrise, a white light visible within a reasonable distance in the direction towards which the motor car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction. The lamp shall be placed on the extreme right or off side of the motor car in such a position as to be free from all obstruction to the light.

"Provided that where a lamp, which exhibits a red light in the direction contrary to that towards which the motor car is proceeding,

1913

WEBSTER v. TERRY.

made in pursuance of the Motor Car Acts, 1896 and 1903, against the appellant Webster for that he on March 24, 1913, at Epping on a certain highway did drive a light locomotive, to wit a motor cycle, during the period between one hour after sunset and one hour before sunrise, namely, at 10.20 P.M., without having attached thereto a lamp so constructed and placed as to exhibit a white light visible within a reasonable distance towards which the motor cycle was proceeding or was intended to proceed, and so as to exhibit a red light so visible in the reverse direction, contrary to the said order.

Upon the hearing of the information the following facts were proved or admitted:—At 10.20 P.M. on March 24 the appellant drove along a public highway at Epping a two-wheeled vehicle propelled by mechanical power, namely, by an internal combustion engine, which vehicle is commonly called a motor cycle. The motor cycle had been duly registered as a motor car in accordance with the Motor Car Act, 1903. At the time the appellant was driving the motor cycle a lamp was attached to the fore part of it, but the lamp was not alight. The lamp was so placed that when lighted it would shew a white light visible in the direction towards which it was proceeding, but not so as to exhibit a red light in the reverse direction. There was no lamp carried attached at the back of the motor cycle which would exhibit a red light in the direction contrary to that towards which the motor cycle was proceeding.

On the part of the appellant it was contended that the motor cycle came within the exemption named in the second proviso to condition 7 (i.) of art. II. of the Order of 1904, i.e., that the motor cycle was a bicycle or other machine to which s. 85 of the Local Government Act, 1888, applied.

On the part of the respondent it was contended that the motor cycle did not come within the said second proviso; that the

---

is carried attached at the back of the motor car, the condition requiring the lamp attached in pursuance of s. 2 of the Act of 1896 to exhibit a red light shall not apply or have effect with regard to the motor car.

"Provided also that the first paragraph of this condition shall not extend to any bicycle, tricycle, or other machine to which s. 85 of the Local Government Act, 1888, applies."

words "bicycle, tricycle, or other machine" in s. 85 of the Act of 1888 did not include a vehicle propelled by a motor engine—in other words, did not include a light locomotive; that s. 85 of the Act of 1888 only applied to the ordinary bicycle, tricycle, or other similar machine in use at the time of the passing of that Act.

The justices were of opinion that the contention of the respondent was correct and that the appellant had committed the offence charged, and they accordingly convicted the appellant.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

Cecil Whiteley, for the appellant. A motor cycle is admittedly a motor car within the definition in art. I. of the Motor Cars (Use and Construction) Order, 1904, but it is exempted from the provisions of condition 7 (i.) of art. II. by the second proviso. That proviso can only refer to motor cycles. An ordinary bicycle is not a motor car as defined by art. I., and therefore, since the enacting part of condition 7 (i.) does not apply to ordinary bicycles, the proviso was not required in order to exempt them from its operation. For lighting purposes motor cycles, as well as ordinary bicycles, are within s. 85 of the Local Government Act, 1888. If the justices' decision is right the result will be that motor cycles must in future always carry two lamps, one in front and one behind, because it is impossible to carry on a motor cycle a lamp which complies with the requirements of the first paragraph of condition 7 (i.).

[Counsel desired to refer to a circular, explanatory of the order, issued by the Local Government Board, but the Court held that this could not be looked at for the purpose of construing the order.]

The respondent did not appear.

BAILHACHE J. This case raises a very short point, namely, whether a motor cycle is bound by art. II., condition 7 (i.), of the Motor Cars (Use and Construction) Order, 1904, to carry a lamp

1913

WEBSTER v. TERRY.

Bailhache J.

shewing white in front and red behind. It has been pointed out that, if a motor cycle is bound to carry a lamp of that sort, it will in practice be necessary to carry two lamps, for it is not possible in the case of a motor cycle for one lamp to exhibit in the requisite manner both a front and a rear light. Art. I. of the order contains a definition of the expression "motor car," and it is conceded that a motor cycle is a motor car within that definition. Then art. II. contains certain conditions which are to be observed by persons using motor cars on highways. The seventh condition deals with the lamp which has to be carried by motor cars under s. 2 of the Act of 1896, and it provides that the lamp shall exhibit a white light in front and a red light behind. There is, however, a proviso to this condition which says that it shall not extend to any bicycle, tricycle, or other machine to which s. 85 of the Local Government Act, 1888, applies. The argument on behalf of the appellant is very simple. It is said that the proviso exempts motor cycles from the liability which they would otherwise be under to carry this particular kind of lamp, or two lamps, one in front and one behind, because, as the definition of motor car does not include an ordinary bicycle, there would otherwise be no object in putting in the proviso; there would be nothing to which it could apply. I have no doubt that for certain purposes a motor cycle is a bicycle within s. 85 of the Act of 1888. It is true that motor cycles were unknown in 1888, but it does not follow that they do not come within the Act of 1888. It is not at all an uncommon thing for an Act to be so construed as to apply to things which were unknown at the time the Act was passed. The question is, Does this proviso apply to motor cycles? I have come to the conclusion that it does not, and I should be very sorry to have to come to any other conclusion, for these regulations as to lamps are enacted for the protection of the public.

I think that the seventh condition of art. II. may be fairly read as including motor cycles, because motor cycles are motor cars as defined in art. I., and I think the object of the second proviso was to make it perfectly plain that the regulation was not to apply to ordinary bicycles. Motor cycles are for certain purposes bicycles to which s. 85 of the Act of 1888 applies, but

1913

WEBSTER v. TERRY.

Bailhache J.

for the purpose of this regulation it was intended to treat them as exceptions and to take them out of that Act whilst leaving in ordinary bicycles. It is quite true that this construction makes the proviso redundant, but it is quite a common thing to find in legislation provisions which are not really necessary but which are inserted for the purpose of making the matter more certain and free from doubt.

I am of opinion that this appeal should be dismissed.

SCRUTTON J. I am unable to come to the same conclusion as my brethren in this case. The case raises a short question of construction, and we are in no way concerned with what ought or ought not to be the law with regard to motor cycles. There is in this order a regulation providing that motor cars shall carry a lamp of a certain description. A motor cycle is a motor car within the definition in the order. It is clear, therefore, that, in the absence of anything further, the regulation as to lamps would apply to motor cycles. But there is a proviso that the regulation shall not extend "to any bicycle, tricycle, or other machine to which s. 85 of the Local Government Act, 1888, applies." Prima facie I should not expect that proviso to apply to anything that was not a motor car, for its object was, I should have thought, to exclude from the regulation some motor cars to which, but for the proviso, it would have applied. It is true that it is sometimes necessary to insert a proviso in order to settle a doubt which might otherwise arise, but I should not have thought that it was necessary to have a proviso to make it clear that an ordinary bicycle is not a motor car. On the other hand, if the intention of the proviso was to say that, for the purpose of this particular regulation as to lamps, a motor cycle is not to be deemed a motor car, I can well understand the necessity for it. The only other question is whether a motor cycle is a bicycle within s. 85 of the Act of 1888. I have not the least doubt that it is, although motor cycles were in fact unknown in 1888. In the same way ordinary bicycles have been held to be carriages for the purpose of some Acts of Parliament, relating to tolls on bridges, which were passed many years before bicycles came into existence.

1913

WEBSTER v. TERRY.

For these reasons I am of opinion that the decision of the magistrates was wrong, and that this appeal ought to be allowed.

RIDLEY J. I agree with Bailhache J. that this appeal must be dismissed. I think it is quite clear that ordinary bicycles were not intended to be dealt with by this order, but the definition of motor car does include a motor cycle. Then the enacting part of the regulation is that motor cars, which would include motor cycles, are to carry a particular kind of lamp. The proviso says that that is not to extend to bicycles, tricycles, or other machines to which s. 85 of the Local Government Act, 1888, applies. I think that the object of that proviso was to prevent the possibility of any error arising through its being thought that the regulation applied to ordinary bicycles. It was, I think, possible that that error might arise, and therefore the proviso was enacted to make it quite clear that ordinary bicycles were to be excluded from the operation of the regulation.

Appeal dismissed.

Solicitors for appellant: *Amery, Parkes & Co.*

F. O. R.

HOLMES *v.* PIPERS, LIMITED.

1913
Oct. 22.

Merchandise Marks—False Trade Description—"Fine British Tarragona Wine"—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

The respondents sold a bottle bearing the label "Fine British Tarragona Wine." The bottle did not contain Tarragona wine or anything like it, but a mixture composed as to 85 per cent. of a wine made and prepared in England from dried raisins, and as to 15 per cent. of Mistella, a heavy form of Tarragona wine made and used solely for blending purposes and not suitable for consumption by itself:—

Held, that the label on the bottle was a false trade description within s. 3 of the Merchandise Marks Act, 1887.

Case stated by a metropolitan police magistrate.

On February 18, 1913, an information was heard which had been preferred by the appellant against the respondents charging them with having on January 21, 1913, at Rye Lane, Peckham, unlawfully sold a bottle of wine, to which there was then applied a false trade description, to wit, "Fine British Tarragona Wine," contrary to the provisions of the Merchandise Marks Act, 1887. (1)

At the hearing it was proved or admitted:—

(*a*) That the appellant, acting on behalf of the Wine and Spirit Association, visited the respondents' shop on January 21, 1913, and asked the shop assistant for a bottle of Tarragona

(1) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 1: "Every person who—

" . . . . . .

"(*d*) applies any false trade description to goods . . . .

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

Sect. 3, sub-s. 1: "For the purposes of this Act—

" . . . . .

"The expression 'trade description' means any description, statement, or other indication, direct or indirect,

" . . . . . .

"(*b*) as to the place or country in which any goods were made or produced, or

" . . . . . .

"(*d*) as to the material of which any goods are composed . . . .

"The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied . . . ."

1913

HOLMES v. PIPERS, LIMITED.

port, and was then served with the bottle the subject of the proceedings.

(*b*) That it was handed to her without being wrapped up.

(*c*) That the appellant then asked the shop assistant to give her a receipt for it, which he did in the following terms:—

"Bought of Pipers Limited, Grocers and Wine and Spirit Merchants, 173, Rye Lane, Peckham, S.E.

"Qt. Bot. Tarragona 1*s.* 1*d.*

"Paid A. D."

The shop assistant was acting contrary to the respondents written and verbal instructions in not describing the wine sold as "British Tarragona" in the receipt.

(*d*) That the appellant had immediately before purchasing the bottle seen similar bottles in the window and noticed and read the labels thereon, which were similar to the label on the bottle purchased.

(*e*) That the bottle bore a label in the following words:—

FINE BRITISH
TARRAGONA
WINE.

(*f*) That Tarragona wine, otherwise known as Tarragona port, s wholly the natural product of the grapes of Catalonia, the fresh fruit being picked, pressed, and fermented there, and the wine made there. In some cases the wine from one district of Catalonia, or from one variety of Catalonian grape, is blended with the wine from another district of Catalonia, or with another variety of Catalonian grape, and the completed product (being wholly the product of the fresh grapes of Catalonia) is shipped from Spain in casks and thus exported to other countries for consumption.

(*g*) That the expression "Tarragona wine" can only properly be applied exclusively to Tarragona wine as above defined.

(*h*) That the said bottle did not contain Tarragona wine as above defined, but contained a mixture composed as to 85 per cent. of a wine made and prepared in England from dried raisins, and as to 15 per cent. of Mistella, a heavy form of Tarragona wine made and used solely for blending purposes and not suitable for consumption by itself.

It was submitted on behalf of the appellant that the said label was a false trade description within the meaning of the Merchandise Marks Act, 1887, on the grounds that—

(i.) The words "Tarragona wine" not being a generic term could not truly describe or be applied to any wine not made in Spain and in the manner aforesaid, and that the contents of the bottle sold by the respondents were not Tarragona wine.

(ii.) The contents of the bottle not being "Tarragona wine" could not truly be described as "Fine British Tarragona wine," as no Tarragona wine properly so described which is also entitled to be called "Fine British" or "British" exists.

(iii.) The words "Fine British Tarragona wine" did not truly describe the contents of the bottle, which were neither wholly British wine nor wholly Tarragona wine, but a mixture, and should have been so described.

(iv.) That although certain regulations made by the Commissioners of Customs and Excise under s. 10 of the Finance Act, 1911, provide that "British wine manufactured in conformity with these regulations must not, by reason of the admixture therewith of foreign wine, be sent out or sold, or exposed for sale, otherwise than under the designation of a British wine," such regulations do not require or justify the use of the word "British" in combination or conjunction with a trade description of a foreign wine of a particular character when such trade description of such foreign wine has not become "generic" within the meaning of the Merchandise Marks Act, 1887.

It was contended on behalf of the respondents that the label constituted a true description of the contents of the bottle, and that it did not infringe the said regulations or the Consolidated Instructions issued from the Custom House, dated February 26, 1900, or the Merchandise Marks Act, 1887.

The magistrate found that the bottle purchased by the appellant did not contain Tarragona wine or anything like it, but he held that the use of the word "British" on the label shewed that the contents were British and not foreign, and that the trade description was British, and that Britain being a country which grows no grapes the word "British" on a bottle of foreign wine put all purchasers upon inquiry. He accordingly came to the

1913

HOLMES v. PIPERS, LIMITED.

conclusion that the label "Fine British Tarragona Wine" truly described the contents of the bottle, and he therefore dismissed the information.

Danckwerts, K.C. (*A. H. Bodkin* with him), for the appellant. The magistrate was wrong in holding that the label in question did not constitute a false trade description. The words "British Tarragona wine" constitute a false trade description inasmuch as there is a false description as to the place or country in which the contents of the bottle were made or produced, and also as to the material of which they were composed. It suggests that the mixture is, or is similar to, Tarragona wine, which is made from grapes in Catalonia, whereas, as the magistrate has found, the bottle did not contain Tarragona wine or anything like it. In *Richards* v. *Banks* (1) it was held in a prosecution under the Refreshment Houses Act, 1860, that the sale of a bottle labelled "Best Pale Sherry, British," by a person not licensed to sell foreign wine, was an offence against the Act, inasmuch as "Best pale sherry" is a foreign wine and that character is not taken away from it by putting the word "British" after it.

[He was stopped.]

Sankey, K.C. (*R. D. Muir* with him), for the respondents. A false trade description under the Act of 1887 is a trade description which is false in a material respect. In what material respect is the label in question in this case false?

[SCRUTTON J. Is it not false to suggest that the bottle contains any sort of Tarragona wine?]

"British Tarragona wine" does not necessarily mean Tarragona wine at all. If a person sells a kind of wine which he calls "British champagne," it is obvious that he does not mean to sell, or the purchaser understand that he is buying, anything like ordinary champagne, seeing that champagne is not made in this country. So in the present case, the collocation of the words "British" and "Tarragona" renders it impossible to say that there has been a material misdescription of the contents of the bottle. The label clearly indicates that the contents are not purely British

(1) (1887) 58 L. T. 634.

wine and not purely Tarragona wine. The purchaser is therefore not misled.

[SCRUTTON J. If a man were to sell a bottle of water under the name of "British champagne" would that be applying a false trade description?]

It would, seeing that water has no resemblance to champagne. But that is very different from the present case.

Further, the label is in accordance with the provisions of the Consolidated Instructions dated February 26, 1900, issued from the Custom House: see these set out in Kerly's Law of Merchandise Marks, 3rd ed., p. 121. Art. 21 of these regulations says: " . . . . A wine, the produce of Germany, and described as 'Port' or 'Sherry' (which words include the names of the places Oporto and Xeres), should have that description accompanied by the statement 'produced in Germany,' or should be described as 'German Port' or 'Australian Sherry,' &c. . . . ." The question of Tarragona wine was considered in *Hooper* v. *Riddle & Co.* (1) In that case the sale was of a bottle of wine with a label bearing the words "Stower's Tarragona Port (Blended with wine produced from finest foreign grapes). Blended, bottled, and guaranteed by Alexr. Riddle & Co., Ltd., 36 and 38, Commercial Street, London." One-third of the contents of the bottle consisted of a special kind of Tarragona port, not fit for drinking by itself; the remaining two-thirds were composed of a wine made from "grape must." Proceedings were taken against the sellers for applying a false trade description to the wine. The magistrate dismissed the information, and this Court refused to interfere. The mixture sold in this case was as much Tarragona wine as the mixture in that case. As to the case of *Richards* v. *Banks* (2), on which reliance is placed for the appellant, it is to be observed that the sole question there was what licence the person summoned had to take out. The case had no reference to the question of merchandise marks and has therefore no bearing on the present case.

RIDLEY J. In this case I think the magistrate ought to have convicted the respondents.

(1) (1906) 95 L. T. 424. (2) 58 L. T. 634.

1913

HOLMES v. PIPERS, LIMITED.

Ridley J.

The wine sold by the respondents was sold as "Fine British Tarragona wine," which is really a mixture consisting of 15 per cent. of Mistella, a wine that comes from Tarragona, and 85 per cent. of a wine made and prepared in England from dried raisins. The magistrate found that by selling this under the description I have mentioned the respondents did not sell it under a false trade description, and, therefore, that they could not be convicted. He found that the bottle did not contain Tarragona wine or anything like it, so the respondents were selling fine British Tarragona wine by description when, in point of fact, it was nothing like Tarragona wine. A somewhat similar question arose in *Hooper* v. *Riddle & Co.* (1) In that case the label on the bottle was in these words: "Stower's Tarragona Port (Blended with wine produced from finest foreign grapes). Blended, bottled, and guaranteed by Alexr. Riddle & Co., Ltd., 36 and 38, Commercial Street, London." That was a different description from the one we are dealing with, and as far as it went it was correct, except, perhaps, for the word "finest"; but a person may, in order to advertise his goods, call them the "finest," without being guilty of applying to them a false trade description. In that case we decided that we were not bound to hold, nor was the magistrate bound to hold, that the words used on that label constituted a false trade description. In this case Mr. Sankey for the respondents relies on the word "British" which appears on the label. It seems that the regulations issued by the Custom House require the word "British" to be used, but that is not material to what we have to deal with to-day. The fact that the word "British" is used on this label does not make it a true description of the contents of the bottle merely because the regulations require its use, and it remains the fact, according to the magistrate's finding, that this mixture sold by the respondents did not contain Tarragona wine or anything like it. It was therefore not a true description, and if it is not true description, why is it not a false one? At one time I thought we might support the magistrate's conclusion that something must be found as to what would be a true description of the mixture in order to ascertain whether this is false or not. On reflection I

(1) 95 L. T. 424.

do not think that is correct. The magistrate has held that this was not a true description, that it was not Tarragona wine or anything like it, and I therefore think that it was his duty to convict the respondents.

SCRUTTON J. The respondents were summoned for selling goods, namely, a bottle of wine, to which a false trade description was applied. On the label were the words "Fine British Tarragona Wine," whereas the contents of the bottle were in fact 15 per cent. of Mistella and 85 per cent. of wine made in England from dried raisins which we were told in the course of the argument were Greek raisins. A false trade description is defined in s. 3 of the Act, and it seems to me that if there is in this case a trade description it comes under clause (*d*), as to the material of which any goods are composed. It is the same sort of case, to take an illustration, as if rabbit skins were sold as lamb skins. Here the magistrate has found that the contents of the bottle sold by the respondents did not contain Tarragona wine or anything like it. In these circumstances one is face to face with the question, does the fact that the word "British" is used save the label from being a false trade description? I understand the magistrate's view to have been that, inasmuch as Tarragona wine is not made in England, the person who calls a thing "British Tarragona" at once shews that it is something out of the common, and puts the buyer upon inquiry; and the buyer cannot expect to get anything like Tarragona wine. I feel great difficulty about adopting that view because it is not every one who knows where Tarragona is, and it appears to me to be assuming too high a standard of knowledge to say that the use of the word "British" puts the buyer upon inquiry. May a man sell a bottle of water and call it British champagne, and as no champagne is made in this country, can he say that the buyer is put upon inquiry? Faced with that, Mr. Sankey replied that the contents of the bottle would be so unlike champagne that it would be a false trade description. I think that if a person calls a thing Tarragona wine he must supply that article or something so like it that it might be described as British Tarragona wine. If that is the test, the magistrate has

1913

HOLMES v. PIPERS, LIMITED

Scrutton J.

found that this was not Tarragona wine or anything like it, and having found that, I am not pressed with his finding that the label does truly describe the contents of the bottle because there is some British wine and some Tarragona wine. I do not think that even "British Tarragona wine" is to be read as a mixture of British wine and Tarragona wine; I read it as Tarragona the genus, and British the species; and once I get that what is supplied is not the genus, the description of the species appears to me not to apply. For these reasons I think there was in this case a false trade description, and therefore that the magistrate should have convicted.

BAILHACHE J. I am of the same opinion. I have listened with interest to Mr. Sankey's argument, but he has failed to convince me that this is not a false trade description. There are two kinds of trade descriptions which have been a good deal under discussion. One of these is where a person applies to an article a fancy name which corresponds to some extent with an article well known in manufacture. The salient instance of that is flannelette—an article in which there is no flannel at all. One can well suppose that it was originally called flannelette because the name would suggest that the substance sold had some resemblance to flannel. It had in fact none, but it was a fancy word, and in course of time people who bought it got to know that it was not flannel. It was therefore held, in a case decided when that knowledge was sufficiently spread, that to call it flannelette was not to apply to it a false trade description. But if the name of a well-known article were used with some qualifying adjective, I do not think it would ever be held that to sell another substance which had no relation to the well-known article would be permissible. In this case the words of the label are "Fine British Tarragona wine." There is such a thing as Tarragona wine. This particular concoction is found by the magistrate not to be Tarragona wine or anything like it. The argument is frequently put forward in these cases that if, taking the whole of the description, a contradiction in terms is found, it is absurd to suppose that any one can be deceived, and therefore the description cannot be a false trade prescription. It is said in

this case that there is a contradiction in terms between the words "British" and "Tarragona." The vice of the argument, however, is that it assumes too much knowledge on the part of the purchaser of this class of article. It is quite true that a person who knows where Tarragona is knows that it is not in Great Britain or in any British possession; but these Acts are meant to protect persons who have not all this knowledge. If a man who had tasted Tarragona port, or had been told that it was a most excellent thing, and had not the smallest conception where Tarragona was, saw in the respondents' shop bottles labelled "Fine British Tarragona wine," the words "British" and "Tarragona" would be no contradiction in terms to him at all, and would not put him upon inquiry. He would think he was getting Tarragona which he had been recommended to buy. That sort of person is deceived by a label of this kind. This label is, in my opinion, a false trade description, and the suggestion that it contains a contradiction in terms to instructed persons is one that ought not to be entertained in this case or in similar cases.

Appeal allowed. Case remitted to magistrate.

Solicitors for appellant: *Monier-Williams, Robinson & Milroy.*

Solicitors for respondents: *Neve, Beck & Kirby.*

J. S. H.

1913
Oct. 23.

THE KING *v.* SIMPSON AND OTHERS.

Certiorari—Acquittal—Maxim "Nemo debet bis vexari pro una et eadem causa" —Justice of the Peace—Statutory Disqualification—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 74; *s.* 103, *sub-s.* 2.

Sect. 103, sub-s. 2, of the Coal Mines Act, 1911, provides that where proceedings are taken in a Court of summary jurisdiction in respect of an offence against the Act alleged to have been committed in a mine "a person employed in a mine . . . . shall not, except with the consent of both parties to the case, act as a member of the Court."

Two miners were charged before justices sitting as a Court of summary jurisdiction with an offence under s. 74 of the Coal Mines Act, 1911, alleged to have been committed in a mine. The information was dismissed. One of the magistrates who formed the Court was a person employed in a mine within the meaning of s. 103, sub-s. 2, of the Act, but this fact was not known to the prosecutor at the time of the hearing, and he did not consent to this magistrate acting as a member of the Court.

On an application for a certiorari to quash the order dismissing the information:—

Held, that as the defendants had been acquitted of the offence charged against them, a certiorari to quash the proceedings ought not to be granted.

RULE NISI directed to justices of the peace in and for the West Riding of the county of York to shew cause why a writ of certiorari should not issue to bring up and quash the orders made by the said justices dismissing a certain information.

The rule nisi was moved for on an affidavit by one Smithson, which stated that on March 19, 1913, a summons was heard by the justices at Castleford against two miners, who were jointly charged upon an information laid by Smithson for that they on March 1, 1913, at Allerton Bywater in the West Riding of Yorkshire, then being persons employed in a certain coal mine, did unlawfully contravene s. 74 of the Coal Mines Act, 1911 (1), in

(1) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 74: "Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Part of this Act or the regulations of the mine or with a view to safety."

Sect. 75: "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act . . . ."

Sect. 103: "(1.) All offences under

1913

REX v. SIMPSON.

that they did not observe certain directions with respect to working which had been given them. The justices after hearing evidence dismissed the information. The affidavit stated further that Smithson subsequently ascertained that one of the justices, John Banks, was at the date of the hearing a person employed in a colliery at Castleford, and that another of the justices, James Smith, had been formerly employed at a coal mine as winding engineman and was at the date of the hearing president of the West Yorkshire Enginemen and Firemen's Association, several members of which were workmen employed in a mine. It was contended that both of these justices were disqualified by s. 103, sub-s. 2, of the Coal Mines Act, 1911, from acting as a member of the Court, except with the consent of both parties to the case, and it was alleged that at the date of the hearing Smithson was unaware that these two justices were disqualified, and that he had not consented to their acting as members of the Court.

The rule nisi was moved for on the grounds, (1.) that the proceedings subsequent to the information and the issue of the summons were void or voidable for want of jurisdiction; (2.) that the Court of petty sessions as constituted had no power to hear or determine the information inasmuch as the said two justices were disqualified from acting as members of the Court; and (3.) that the alleged determination was not a decision according to law by a Court of competent jurisdiction.

Affidavits were filed in reply in which it was admitted that John Banks was at the date of the hearing a person employed in a coal mine, but it was alleged that this fact was known to the

---

this Act not declared to be misdemeanours . . . . may be prosecuted . . . . in manner directed by the Summary Jurisdiction Acts . . . .

"(2.) Where proceedings are taken before a Court of summary jurisdiction in respect of an offence against this Act alleged to have been committed in or with reference to a mine, a person who is the owner, agent, or manager of any mine, or a person employed in a mine, or the father, son, or brother, or father-in-law, son-in-law, or brother-in-law, of such owner, agent, manager, or person, or who is an officer of any association of persons so employed, or who is a check-weigher appointed under the Coal Mines Regulation Acts, 1887 to 1905, or who is a director of a company which is the owner of a mine, shall not, except with the consent of both parties to the case, act as a member of the Court."

1913

REX v. SIMPSON.

parties and that they had consented to his acting as a member of the Court. It was not admitted that James Smith was disqualified.

The Court, as appears hereafter, discharged the rule without giving any decision on these questions of fact, and it is therefore unnecessary to set out the evidence in detail.

J. Sankey, K.C., and *Coutts Trotter*, for the justices, shewed cause against the rule. It is admitted that one of the justices was disqualified under s. 103, sub-s. 2, of the Coal Mines Act, 1911, from acting as a member of the Court except with the consent of both parties. Assuming that the prosecutor did not consent, certiorari ought nevertheless not to be granted. There is no authority to be found for a certiorari to quash an acquittal. The maxim "Nemo debet bis vexari pro una et eadem causa" applies. The defendants "ought not to be twice put in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred . . . . If there be an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal": *Reg.* v. *Russell* (1), per Lord Campbell C.J. In *Reg.* v. *Duncan* (2) Lord Coleridge C.J. said: "The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." These defendants have stood in danger of imprisonment. If they had been convicted, the conviction would have been voidable only and not void: *Dimes* v. *Proprietors of the Grand Junction Canal.* (3) The magistrate in question was not absolutely disqualified, but only disqualified if both parties did not consent to his acting. Until a voidable conviction has been quashed, imprisonment thereunder is a legal imprisonment. The defendants therefore stood in danger of legal imprisonment. In *Rex* v. *Justices of Galway* (4) it was held by the King's Bench

(1) (1854) 3 E. & B. 942, at p. 950.
(2) (1881) 7 Q. B. D. 198, at p. 199.
(3) (1852) 3 H. L. C. 759.
(4) [1906] 2 I. R. 499.

1913

REX v. SIMPSON.

Division in Ireland that "an order of acquittal made by a chairman and justices of quarter sessions (assuming one of the justices to have been biassed) cannot be quashed on certiorari," the ratio decidendi being that the order of a biassed tribunal is voidable only, not void. The present case stands upon the same footing. If this acquittal were to be quashed and the defendants were prosecuted again for the same offence, they could not successfully plead autrefois acquit, for the original acquittal having gone the plea could not be proved.

[RIDLEY J. referred to *Reg.* v. *Drury.* (1)]

That was not a case of certiorari. The conviction there was bad on its face because a sentence of transportation for ten years was imposed, whereas the Act of Parliament did not authorize more than seven years. The conviction was, therefore, set aside on a writ of error, and on the prisoners being again indicted it was held they could not plead autrefois acquit, a judgment reversed being the same as no judgment. But certiorari does not lie "to remove a decision of justices to commit or refuse to commit a defendant for trial, nor to remove an acquittal, for an order of an inferior Court, even though defective for errors on its face or for want of jurisdiction, is not void, but only voidable, and therefore to quash an acquittal would be to put a man in peril twice for the same offence": Lord Halsbury's Laws of England, vol. x., p. 160. [*Ex parte Spencer* (2) was also referred to.]

Lewis Thomas, K.C., and *G. H. Higgins*, for the prosecutor, in support of the rule. The maxim "Nemo debet bis vexari" does not apply to this case. The plea of autrefois acquit or autrefois convict can only be successfully raised when the prisoner has been in peril of imprisonment under an order of a Court of competent jurisdiction. The justices who dismissed this information did not constitute a Court of competent jurisdiction, for one of them was under a statutory disqualification from acting as a member of the Court. For the purpose of this case he was not a justice at all; he was in just the same position as any other member of the public who, not being a magistrate, purports to

(1) (1849) 3 Car. & K. 193. (2) (1839) 1 Per. & Dav. 358.

1913

REX v. SIMPSON.

act in that capacity. It cannot be said that the decision of the justices was good until it was set aside. Sect. 103, sub-s. 3, of the Coal Mines Act, 1911, does not say that the persons specified shall be qualified to act as members of the Court provided the parties do not object. The section imposes an absolute disqualification which exists until it is removed by the consent of the parties. Their consent was an essential ingredient in the jurisdiction of the Court, and without it the Court had no jurisdiction. The order of acquittal was not merely voidable, but absolutely void, having been made without jurisdiction. The defendants were, therefore, never in danger of imprisonment under an order of a Court of competent jurisdiction, and if they were put on their trial a second time they could not successfully plead autrefois acquit: *Rex* v. *Marsham* (1); *Davis* v. *Morton.* (2) *Rex* v. *Justices of Galway* (3) is not in point, as that was a case of bias and the decision proceeded entirely on the basis that the judgment in question was voidable and not void; and it is to be observed that in *Reg.* v. *Justices of Antrim* (4), which was also a case of bias, Holmes J. pointed out that judgments of inferior Courts are quashed by certiorari for the purpose of keeping those Courts within their jurisdiction, and that as an acquittal, as well as a conviction, may result from justices usurping jurisdiction, it is impossible to draw any logical distinction between them; and Lord O'Brien C.J., who also delivered one of the judgments in *Rex* v. *Justices of Galway* (3), said in *Reg.* v. *Justices of Antrim* (5) that "if the case were one where the tribunal was ex facie wholly unauthorized, and the accusation and accused plainly coram non judice, the matter would be entirely different." Lord O'Brien C.J. again drew attention to this distinction in *Rex* v. *Justices of Waterford* (6) and in *Rex* v. *Justices of Galway.* (3) It is clear, therefore, that the decision in *Rex* v. *Justices of Galway* (3) must be read as being strictly confined to disqualification resulting from bias, and the decision cannot be regarded as any authority as to the consequences of a statutory disqualification. There are instances in the books of the quashing of an acquittal by certiorari.

(1) [1912] 2 K. B. 362.
(2) [1913] 2 K. B. 479.
(3) [1906] 2 I. R. 499.
(4) [1895] 2 I. R. 603, at p. 654.
(5) [1895] 2 I. R. at p. 636.
(6) [1901] 2 I. R. 548, at p. 558.

In *Rex* v. *Allen* (1) a conviction by justices at petty sessions was quashed on appeal by quarter sessions; but the Court of King's Bench granted a certiorari to quash the order of quarter sessions; and the same course was adopted in similar circumstances in *Rex* v. *Ridgway*. (2)

RIDLEY J. In my opinion this rule must be discharged. I think that the case is one to which the maxim "Nemo debet bis vexari" applies. There does not appear to be any case in the books where an acquittal by a Court of summary jurisdiction has been quashed by a writ of certiorari, though there is authority that, where a judgment on an indictment has been reversed by writ of error or analogous proceedings for a defect appearing on the face of the record, the prisoner cannot plead autrefois acquit or autrefois convict to a subsequent indictment for the same offence: see *Reg.* v. *Drury*. (3) In *Reg.* v. *Duncan* (4), on an indictment for obstruction of a highway tried at the assizes, the defendant was acquitted, and an application was made for a new trial. In the course of the argument the Court asked, "Has a new trial ever been granted after acquittal?" and counsel (Mr. Charles, Q.C.) replied that "no new trial can be granted either after conviction or acquittal." In delivering judgment Lord Coleridge C.J. said: "It is plain that we cannot interfere. What may have been the constitutional or legal principles on which the practice was founded it is much too late to inquire. The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." That is a principle which I think we should be very slow to transgress. It is true that the charge in the present case was not one of a very serious character, but the principle involved is one of great importance, and if it were once assailed by the introduction of exceptions, they might in course of time be applied to very different cases. If, therefore, I find that these defendants have once stood in danger and

(1) (1812) 15 East, 333.
(2) (1822) 5 B. & Ald. 527.
(3) 3 Car. & K. 193.
(4) 7 Q. B. D. 198.

1913

REX v. SIMPSON.

Ridley J.

have been acquitted, then in my opinion this Court ought not to grant a certiorari to quash the acquittal. The question, therefore is, have the defendants, in the words of Lord Coleridge C.J. in *Reg.* v. *Duncan* (1), stood in danger of imprisonment? They were charged with an offence under s. 74 of the Coal Mines Act, 1911. It is provided by s. 103 of that Act that certain persons connected with mines shall not, except with the consent of the parties, act as members of a Court of summary jurisdiction before which proceedings are taken in respect of an offence against the Act. It is admitted that one member at least of the Court which dealt with this case was disqualified under that section from being a member of the Court, except with the consent of the parties, and it is said, and for the purpose of my decision I assume, that the prosecutor did not know at the time of that magistrate's disqualification or consent to his acting as a member of the Court.

We have been referred to an Irish decision, *Rex* v. *Justices of Galway* (2), which is, of course, not binding on this Court, but which is entitled to very great consideration. The head-note of the report is as follows: "An order of acquittal made by a chairman and justices of quarter sessions (assuming one of the justices to have been biassed) cannot be quashed on certiorari. The order of a biassed tribunal is voidable only, not void"; and Lord O'Brien C.J. in delivering judgment said (3): "The question is this—Can an order of acquittal pronounced by justices at petty sessions, or by a chairman and justices at quarter sessions, one of whom was biassed, be brought up on certiorari and quashed, so that the accused may be subjected to trial again? There is no instance in the history of our law of an acquittal under such circumstances being brought up on certiorari. What is the principle? That a man cannot be put in peril twice for the same offence. Was this man put in peril before the tribunal that is alleged to be biassed? I am of opinion that he was, and for this reason, that the order of a biassed tribunal is voidable only, and not void. That such an order is voidable only, and not void, clearly follows

(1) 7 Q. B. D. 198. (2) [1906] 2 I. R. 499.
(3) [1906] 2 I. R. at p. 502.

from the case of *Dimes* v. *Proprietors of the Grand Junction Canal* (1), a familiar case, and one of the highest authority. Now, if the order is voidable only, and not void, the accused was in peril when he stood before the tribunal. Though in this case he was acquitted, he might have been convicted. He was certainly in peril, because he might have been arrested and imprisoned on a voidable order, and a very considerable time might elapse before a voidable order could be avoided by proceedings by way of certiorari. Until avoided, a voidable order justifies both arrest and imprisonment." The Lord Chief Justice then quoted the passage from the judgment of Lord Coleridge in *Reg.* v. *Duncan* (2) which I have already read, which he says states the principle contained in the maxim "Nemo debet bis vexari," and he then read the following passage from his own judgment in *Reg.* v. *Justices of Antrim* (3): "If the case were one where the tribunal was ex facie wholly unauthorized, and the accusation and the accused plainly coram non judice, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity, not merely voidable, but void."

I think that the distinction there pointed out is the one on which we ought to take our stand. In my opinion the presence on the bench of a magistrate who was qualified to act as a member of the Court only if the parties consented cannot in the words of Lord O'Brien render the tribunal "ex facie wholly unauthorized." I think it makes the decision voidable only. Palles C.B. gave a similar judgment in *Rex* v. *Justices of Galway.* (4) It is true that in the above quoted case, *Reg.* v. *Justices of Antrim* (5), Holmes J. took a somewhat different view, and pointed out that as an order of acquittal, as well as a conviction, might result from justices usurping or exceeding jurisdiction, it was impossible to draw any logical distinction between the two cases; but the examples given by him of cases where a plea of autrefois acquit could not be raised are cases, such as a trial for rape at quarter sessions or for treason by a court-martial, where there could be

(1) 3 H. L. C. 759.
(2) 7 Q. B. D. 198.
(3) [1895] 2 I. R. at p. 636.
(4) [1906] 2 I. R. 499.
(5) [1895] 2 I. R. at pp. 653, 654.

1913

REX v. SIMPSON.

Ridley J.

no colour of jurisdiction or ground for saying that the accused had ever been in peril. In the present case I think that the defendants did stand in peril, and therefore the acquittal cannot be questioned in subsequent proceedings.

For these reasons I am of opinion that this rule ought to be discharged.

SCRUTTON J. I have come to the same conclusion, though I am not sure that I do so on quite the same grounds. Proceedings were taken against two defendants for an offence alleged to have been committed by them under s. 74 of the Coal Mines Act, 1911. The case was heard by a Court of summary jurisdiction and the defendants were acquitted. It is admitted that one of the magistrates who heard the case was by s. 103 of the Act disqualified from acting as a member of the Court except with the consent of the parties. The prosecutor says that he did not know of this disqualification until after the case had been heard, and on that ground he applies for a certiorari to quash the acquittal. It is said on behalf of the defendants that there is no power to quash an acquittal, and that no such power has ever been exercised in the history of England, the reason being that it is a principle of our law that no man shall twice be put in peril in respect of the same charge. The question does not appear to have been the subject of much discussion in the English authorities, but there is a passage in the judgment of Lord Campbell C.J. in *Reg.* v. *Russell* (1) which is relevant. He there said: "If there be an improper conviction, it should be set aside, but I hope that the same practice will never prevail in the case of an acquittal." There has, however, been a series of cases in Ireland in which it has been sought to quash acquittals on the ground that there was bias on the part of some member of the Court, and in the most recent of these cases, *Rex* v. *Justices of Galway* (2), the Full Court of King's Bench held that an acquittal could not be quashed by certiorari, on the ground that bias renders the decision of a Court not void but voidable only, and, therefore, unless and until the decision is quashed

(1) 3 E. & B. 942.

(2) [1906] 2 I. R. 499.

1913

REX v. SIMPSON.

Scrutton J.

the defendant remains in peril. That case is not, in my opinion, an authority for saying that the same rule applies where a person sits as a member of a Court when he is by statute disqualified from so doing. I am inclined to think, though in my view it is not necessary for us to decide that point, that where a person acts as a member of a Court when he is under a statutory disqualification the Court cannot be said to be a Court of competent jurisdiction. If that be so, a defendant tried by that Court would never have been in peril, for the proceedings would be a mere nullity. But I do not propose to decide that point for the following reason. If we were to quash this acquittal, and fresh proceedings were to be subsequently instituted against the defendants in respect of the same alleged offence, the defendants would not be able to plead autrefois acquit, for the acquittal having been quashed there would be no acquittal in existence. If, however, in any subsequent proceedings the defendants should raise the plea of autrefois acquit it will be open to the Court to decide whether the previous hearing was before a Court of competent jurisdiction. That is the ground, a somewhat narrow one, on which I am prepared to decide this case. I only wish to add that there never has been a case in which an acquittal by a Court of summary jurisdiction has been quashed by certiorari, and, although in some cases judges have acted proprio vigore in making precedents, I do not myself feel disposed to do so in this case.

Bailhache J. The two defendants were charged with an offence against the Coal Mines Act, 1911. The case came on for hearing before a bench of magistrates one of whom was by s. 103 of the Act disqualified from sitting in judgment on the offence charged unless the parties consented to his doing so. For the purpose of my judgment I assume that no consent was given by the prosecutor, and the magistrate in question was therefore disqualified by statute from taking part in the proceedings. In these circumstances an application is made to this Court to quash the order of the magistrates dismissing the information. Several authorities have been cited to us, but no case has been

1913

REX v. SIMPSON.

Bailhache J.

found in either the English or Irish reports in which an acquittal has been quashed, except cases where there has been a writ of error or some analogous proceeding in respect of a defect apparent on the face of the record. Those cases raise very different considerations, and I merely mention them in order to shew that I have not overlooked them. There have been cases in Ireland where attempts have been made to obtain certiorari to quash acquittals where the tribunal has been biassed, but those attempts have failed.

It has been contended before us on behalf of the prosecution that the present case is not quite on all fours with the Irish cases, because those were cases where the acquittal was attacked on the ground that the tribunal had been biassed, whereas in the present case the question is not one of bias, but of a magistrate adjudicating on a case when he was under a statutory disqualification from doing so; and, therefore, it is said that we ought to quash the acquittal because it was not a decision of a Court of competent jurisdiction, and consequently the defendants were never in peril.

In my opinion this Court ought to be very slow to quash an acquittal, for it is a time-honoured maxim of our law that a man, whether he has been acquitted or convicted, should not be tried twice for the same offence. I do not think we ought to interfere in a case like this, where the adjudicating tribunal was apparently competent but in fact one member of it was disqualified, but only where the tribunal was of obviously incompetent jurisdiction or was exercising a jurisdiction manifestly in excess of its powers. I desire to adopt the following passage from the judgment of Lord O'Brien C.J. in *Reg.* v. *Justices of Antrim* (1), which was quoted by him in *Rex* v. *Justices of Galway* (2): "If the case were one where the tribunal was ex facie wholly unauthorized, and the accusation and the accused plainly coram non judice, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity, not merely voidable, but void." If a case of that sort were to come before this Court, it may be that we ought to interfere and grant

(1) [1895] 2 I. R. at p. 636. (2) [1906] 2 I. R. 499.

a certiorari to quash acquittal, although there is no authority for doing so, but, except in the very clear class of case of want of jurisdiction suggested by Lord O'Brien C.J., I am of opinion that certiorari ought not to be granted to quash an acquittal.

1913

REX v. SIMPSON.

Rule discharged.

Solicitors for prosecution: *Jackson & Jackson, for Gichard & Gummer, Rotherham.*

Solicitor for justices: *T. Alwin Davison, Castleford.*

F. O. R.

THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SERVINI.

1913
Oct. 24.

Extradition — Habeas Corpus — Jurisdiction of Committing Magistrate — Evidence—Omission to prove Order in Council—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *ss.* 2, 10.

A police magistrate committed a fugitive criminal to prison with a view to his extradition to Italy. There was an Order in Council applying the Extradition Act, 1870, in the case of Italy, but the Order was not formally proved before the magistrate, he being aware of its existence. A rule nisi for a writ of habeas corpus for the discharge of the prisoner having been obtained on the ground that in the absence of proof of the Order in Council the magistrate had no jurisdiction to make the order of committal:—

Held, discharging the rule, that the mere omission to give formal proof of the Order in Council, which contained nothing that could assist the prisoner, did not entitle the prisoner to be released.

Per Scrutton and Bailhache JJ.: The Order in Council should be given in evidence before the committing magistrate.

RULE NISI to the governor of His Majesty's prison at Brixton to shew cause why a writ of habeas corpus should not issue to him to bring up the body of Pietro Servini in order that he might be discharged from custody.

The prisoner Servini had been arrested in England on the requisition of the Italian Government and brought before a metropolitan police magistrate sitting at Bow Street Police Court and had been committed by him to prison for the purpose of

1913

REX v. BRIXTON PRISON (GOVERNOR). SERVINI, *Ex parte*.

extradition on a charge of forgery and uttering false promissory notes alleged to have been committed in Italy.

The rule nisi was granted on the ground (inter alia) that no proof was given before the committing magistrate of the Order in Council applying the Extradition Acts to Italy.

In an affidavit by the clerk at Bow Street Police Court, filed in answer to the rule nisi, it was stated that it was the fact that formal evidence was not given before the committing magistrate of the publication in the *London Gazette* of the Order in Council relating to the extradition treaty with Italy; that it was not the practice to give such evidence in similar cases; that as practically all cases under the Extradition Acts were dealt with at Bow Street Police Court, the magistrates attached to that Court had knowledge from the Orders in Council, *London Gazette*, and text-books at the Court of the various Orders in Council applying the Extradition Acts in the case of different foreign States; and that at the time the magistrate committed Servini the magistrate knew that the treaty between Great Britain and Italy had been adopted by an Order in Council dated March 24, 1873, which had been published in the *London Gazette* of April 1, 1873.

Sir J. Simon, A.-G., and *Branson* shewed cause against the rule. The procedure under the Extradition Act, 1870, with regard to the arrest and surrender of a fugitive criminal, begins (s. 7) with a requisition for his surrender addressed by a foreign State to a Secretary of State, who then requires a magistrate to issue a warrant for his apprehension. The warrant is issued on such evidence as would justify the issue of the warrant if the crime had been committed in England (s. 8). The fugitive criminal having been arrested, he is brought before a magistrate at Bow Street (s. 9), and if "such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England," the magistrate shall commit him to prison (s. 10). The order for extradition is not made by the magistrate but by the Secretary of State (s. 11). The right given by s. 11 to a fugitive criminal to apply for a writ of

habeas corpus is to enable him to contend that the order of committal was wrongly made either because there was evidence that the offence was of a political character or that it was not an extradition crime, or that a prima facie case had not been made out. The only question which can be dealt with on habeas corpus is the question of the magistrate's jurisdiction: *In re Counhaye* (1); *Reg.* v. *Ganz* (2); *Rex* v. *Governor of Holloway Prison, Ex parte Siletti.* (3) In the last cited case it was pointed out that this Court cannot consider the question of the weight of the evidence given before the magistrate. It is erroneous to suppose that a fugitive criminal is entitled to be discharged on habeas corpus on account of some technical flaw in the proceedings. If it is the fact, as it is in this case, that the magistrate had jurisdiction to act under the Extradition Act, habeas corpus will not be granted merely because formal proof was not given of the existence of a fact necessary to give that jurisdiction. Habeas corpus would never be granted on a mere technicality in the case of an ordinary prisoner committed for trial, and a fugitive criminal is in no better position. This Court has power, if it be necessary, to allow further evidence to be given in order to prove that the magistrate in fact had jurisdiction: *In re Castioni.* (4) [*In re Arton* (5), *Rex* v. *Governor of Brixton Prison* (6), *Ex parte Krans* (7), and *Rex* v. *Marks* (8) were also referred to.]

Harker, in support of the rule. In order to give the magistrate jurisdiction in such a case it is essential that the Order in Council applying the Extradition Act in the case of a foreign State should be proved. Sect. 2 of the Extradition Act, 1870, is altogether useless if the Order in Council need not be proved. The whole right to extradite a prisoner rests on treaty, and s. 2 says that where an extradition treaty has been made with a foreign State His Majesty may by Order in Council direct that the Act shall apply in the case of such foreign State, and the section further provides that the operation of the Order may be limited

(1) (1873) L. R. 8 Q. B. 410.
(2) (1882) 9 Q. B. D. 93.
(3) (1902) 87 L. T. 332.
(4) [1891] 1 Q. B. 149, at p. 157.
(5) [1896] 1 Q. B. 108, 509.
(6) [1911] 2 K. B. 82.
(7) (1823) 1 B. & C. 258.
(8) (1802) 3 East, 157.

1913

REX v. BRIXTON PRISON (GOVERNOR). SERVINI, *Ex parte.*

and be subject to such conditions, exceptions, and qualifications as may be deemed expedient. It is therefore of the utmost importance that a foreigner whom it is sought to extradite should, by the production of the Order in Council, know whether the proceedings taken by the foreign country comply with the requirements of the treaty as affected by the Order in Council, seeing that there may be differences between the treaty and the Order. In Halsbury's Laws of England, vol. xiv., p. 410, it is stated explicitly that a copy of the Order in Council must be produced before the magistrate. The cases of *Reg.* v. *Ganz* (1) and *Rex* v. *Governor of Brixton Prison* (2) cited by the Attorney-General did not deal with the position that has arisen in this case, namely, the jurisdiction of the magistrate where the Order in Council has not been proved. The Order in Council cannot now be allowed to be proved as the proceedings would be out of time: see art. 12 of the treaty with Italy, which provides that if, within two months from the arrest of the accused, sufficient evidence be not produced for his extradition, he shall be liberated. (3)

RIDLEY J., after holding that there was evidence before the magistrate which justified the order of committal, continued: The main question raised on behalf of the applicant is that no proof was given before the committing magistrate of the Order in Council applying the Extradition Acts to Italy. Such an Order in Council exists, but it was not produced or proved before the magistrate. The affidavit made by the clerk at Bow Street Police Court states that the magistrates there have knowledge of the various Orders in Council; the Orders are taken as known, and the formality of proving them is not gone through. There being such an Order in Council, there is therefore no objection in substance to the magistrate's jurisdiction, the treaty with Italy including the offences on which the applicant has been committed. The only point that is made is that the Order in Council was not

(1) 9 Q. B. D. 93.
(2) [1911] 2 K. B. 82.
(3) It was also argued that there was no evidence of the alleged crimes which justified an order of committal, but it is unnecessary for the purposes of this report to set out the argument on this point.

formally proved; and the question now is, is that objection one that can be properly taken by Servini, who asks to be discharged from custody, not because he, in substance, should not be committed, but because formal proof of one matter was omitted? If it could have been said that there was no evidence that the crime alleged to have been committed by Servini was in the treaty, that would have been a matter of substance, and in such a case the magistrate would have had no jurisdiction to commit him for extradition. But in circumstances such as we are now dealing with I can find no authority to shew that the prisoner is entitled to be discharged. It is in my opinion undesirable to apply the writ of habeas corpus to a case of this kind—a case where a mere technicality not affecting the merits is the only point raised. This view is I think borne out by the authorities which were quoted by the Attorney-General and to which I shall briefly refer. The first of these is *In re Counhaye*, where Blackburn J. said (1): "As to the objection that the terms of the treaty have not been complied with, and the order of the Secretary of State ought therefore not to have been made, I do not think that affects the magistrate's jurisdiction; if the conditions of the treaty have not been complied with the Secretary of State might have refused to order a magistrate to proceed; but these conditions are not in the Act of Parliament; and the Secretary of State having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it." The facts in that case were not the same as those with which we are dealing, but the case is a clear authority for the proposition that if the magistrate had jurisdiction this Court ceases to have the right or duty to inquire further into the matter. The question, therefore, is, had the magistrate jurisdiction in this case? We must assume that the Secretary of State has rightly issued his requisition, but if it appeared that the magistrate acted without jurisdiction this Court would interfere. Such a case would arise if the magistrate acted without having any evidence before him at all, and such a case was considered in *In re Arton* (No. 2) (2), in

(1) L. R. 8 Q. B. 410, at p. 416.

(2) [1896] 1 Q. B. 509.

1913

REX v. BRIXTON PRISON (GOVERNOR). SERVINI, *Ex parte.*

Ridley J.

which the question was whether the fraudulent falsification of accounts which was charged in that case was in itself an offence which was equivalent to that which was expressed in the French treaty. In that case Lord Russell of Killowen C.J. said in giving judgment (1): "I think I have correctly stated the view of the facts taken by the learned chief magistrate. We are not a Court of Appeal on questions of fact from him. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit." There the Court went into the matter in order to see whether the magistrate had jurisdiction or not. In a similar way in *In re Castioni* (2) the Court suggested that evidence might be taken as to whether the offence on which the prisoner was committed for extradition was of a political character. I am not quite sure how far some of the expressions used by Denman J. in that case ought to be pressed, but the case is another example of this, that where the question is whether the magistrate had jurisdiction or not, the Court has to satisfy itself; and if the magistrate had no jurisdiction the remedy may be sought by habeas corpus. But this case is quite different; here there are no merits at all. This case is much more like *Rex* v. *Governor of Holloway Prison, Ex parte Siletti* (3), and there Bigham J. laid it down when this Court would interfere and when it would not. He there said: "Then, if he [the accused] applies for a habeas corpus and obtains a rule, the question arises what points may be taken upon the argument of the rule. For my part, I think the only question that this Court can entertain is the question of jurisdiction, and, applying that observation to this particular Act, all that the accused person may say is that the crime with which he was charged was not a crime within the meaning of the Extradition Act—that is to say, that it did not come within the class of offences contemplated, or that it was an offence of a political character and therefore was outside the Act altogether. He may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. These things he may say; but I am

(1) [1896] 1 Q. B. at p. 517. (2) [1891] 1 Q. B. 149.
(3) 87 L. T. 332.

clearly of opinion that there is one thing he cannot say—namely that there is evidence one way and the other, and that this Court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly. That he cannot say."

For these reasons I think the rule should be discharged.

SCRUTTON J. Servini is in Brixton Prison in process of being extradited to Italy on a charge of forgery. He has obtained a rule for a habeas corpus to shew cause why he should not be released on the ground, among others, that the magistrate had no jurisdiction to commit him because evidence was not given of the Order in Council applying the Extradition Act in the case of Italy.

The Extradition Act applies where His Majesty, by Order in Council, has directed that it shall apply. It is said by Mr. Harker on behalf of Servini that the Order in Council and treaty may not be the same as the Act; they may restrict the crimes on which extradition is possible; they may impose time limits; they may contain provisions in favour of the prisoner; and as the Act does not apply unless there is such an Order in Council the Order in Council ought to be given in evidence against the prisoner. As a general principle I agree. I follow why the Order in Council was not in fact given in evidence at Bow Street, namely, that the magistrates there are continually dealing with these cases and know perfectly well that there is an Order in Council, and they know its provisions. The knowledge of it is assumed. I do not think, however, that the fact that the magistrate knows of the Order in Council necessarily concludes the matter. It may be of importance to the prisoner to see it and have it proved in order to see whether it contains any provisions which assist him, and whatever may have been the practice at Bow Street in the past I think the Order in Council ought always to be proved. But then comes the question, does the fact that it was not proved in this case, and that the magistrate assumed a knowledge of it, entitle the prisoner to the writ of habeas corpus? We have seen the *London Gazette* and know there is an Order in Council, and it is admitted that there is nothing in it which, if it had been given in evidence, would have

1913

REX v. BRIXTON PRISON (GOVERNOR). SERVINI, *Ex parte.*

Scrutton J.

benefited the prisoner. In these circumstances should the Court grant the writ of habeas corpus—a writ which has been of the greatest value in the history of England and one of the greatest securities for the liberty of the subject? I agree that we must approach the question from the point of view of the liberty of the subject, but while the Courts have always used the writ of habeas corpus as a very strong defence of the subject they have always used it to effect justice. For instance, when a man has been detained under an informal and technically bad conviction and has applied for a habeas corpus, the Court, if satisfied that there is a prima facie case against him, have not released him but have recommitted him in order that he may be dealt with on the charge on which there is a prima facie case against him. That was decided in *Rex* v. *Marks*. (1) In *Ex parte Krans* (2) there was not even a warrant at all, but the Court, being satisfied that a prima facie case of murder might be made against the prisoner, recommitted him in order that he might be dealt with in respect of that crime. The same principle was applied in *Rex* v. *Clarke* (3), a case as to a lunatic. A writ of habeas corpus issued to bring up the body of the alleged lunatic. It appeared that she was then detained although no commission of lunacy had been issued, but it was proved to the Court that she probably was a lunatic and that a commission of lunacy was about to be issued, whereupon the Court declined to grant the writ, endeavouring to do justice rather than take advantage of a technicality. In the case now before us proof was not given of one matter, but if that matter had in fact been proved the prisoner would not have been assisted in any way. As I have said, there is an Order in Council applying the Extradition Act to Italy, and therefore, following the principle on which the Courts have acted, I personally decline to issue the writ, while at the same time I agree as to the general importance of proving Orders in Council. I agree that the rule must be discharged.

BAILHACHE J. I am not going to differ from the judgments which have been delivered. I should like, however, to say

(1) 3 East, 157. (2) 1 B. & C. 258.
(3) (1762) 3 Burr. 1362.

something on the point as to whether the Order in Council in an extradition case ought to be proved, and whether, indeed, it is an essential matter to be proved in order to found the magistrate's jurisdiction to commit. In my judgment it is. The matter stands in this way: extradition is a matter of statutory provision, and it can only be applied to a fugitive criminal from a State with which we have treaty relations and Orders in Council applying the Act. In this case Servini was a fugitive criminal, and with Italy we have a treaty and an Order in Council applying the Act. In these circumstances, when a request for Servini's extradition was made by the Italian Government, His Majesty's Secretary of State sent a request to the magistrate at Bow Street to issue his warrant for the apprehension of Servini. On receiving such a requisition I apprehend that the magistrate then proceeds to act under s. 8 of the Extradition Act, 1870, and he issues his warrant on such evidence as would in his opinion justify its issue if the crime had been committed or the criminal convicted in England. I have no doubt that at that stage of the case the magistrate would be at liberty to use his general knowledge and experience, and, without looking at the Order in Council, if he knows of it, he would issue his warrant. But when the fugitive criminal is apprehended the matter assumes a very different shape, and the prisoner is dealt with under s. 10 of the Act, under which the magistrate has only to act if he has such evidence as would justify him in committing the prisoner for trial if the crime of which he is accused had been committed in England. All is to be done subject to the provisions of the Act. When the case has reached that stage I apprehend that what is necessary to be proved, inter alia, is that a crime has been committed by the accused in the foreign country, and that there is an Order in Council which applies the Extradition Act to that foreign country. The Order in Council goes to the root of the magistrate's jurisdiction in the matter, and in my judgment it is an essential fact to be proved in the prisoner's presence before the warrant committing him to prison can be issued. On behalf of Servini it is said that that was not done in this case ; that he is in Brixton Prison on a warrant when

1913

REX v. BRIXTON PRISON (GOVERNOR). SERVINI, *Ex parte.*

Bailhache J

a fundamental fact necessary to be proved was not in fact proved. I think this contention on behalf of Servini is right. It is said, however, that this is a technical objection, because, if the mind of the magistrate had been directed to the point, the missing fact could have been proved in an instant by the production of the Order in Council. In my judgment when a fact in a criminal case requires to be proved, and is not proved, it is no answer to say that if it had been thought of it could easily have been proved. I very much doubt whether this is a mere technical point, and for this reason: by the treaty with Italy a person cannot be extradited unless all the facts necessary to be proved for his extradition are proved within two months of his arrest. Two months have long since elapsed in the case of Servini, and therefore, if for no other reason, it seems to me that the necessary evidence could not now be forthcoming and the Order in Council proved in this Court. So far it is clear that in my judgment I should have thought that the writ of habeas corpus ought to have issued, but the other members of the Court take a different view, and I have no doubt that they are right in saying that the writ ought not necessarily to issue where the Court is satisfied that although the applicant may not be quite regularly in custody yet substantially and on the merits he is properly in custody. They tell me that the same rule which governs the granting of the writ in favour of a British subject ought to apply and does apply when the writ is applied for by a subject of a foreign country sought to be extradited. I accept their view upon this point and I agree that the rule should be discharged.

Rule discharged.

Solicitor for applicant: *Guy Wallington.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. S. H.

SHAWE STOREY, Appellant *v.* INLAND REVENUE COMMISSIONERS, Respondents.

1913
Oct. 27.

Revenue—Mineral Rights Duty—Mineral Way-leave—Way-leave over Lessor's Land for Minerals not got from Demised Mines—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 20, 24.

Sect. 20, sub-s. 1, of the Finance (1909-10) Act, 1910, imposes a duty called mineral rights duty on the rental value of all rights to work minerals and of all mineral way-leaves.

Sect. 20, sub-s. 2, provides that the rental value is to be taken to be, in the case of a mineral way-leave, the amount of rent paid by the working lessee in the last working year in respect of the way-leave.

Sect. 24 defines the expression "mineral way-leave" as "any way-leave . . . . or right to use a shaft granted to or enjoyed by a working lessee, whether above or under ground, for the purpose of access to or the conveyance of the minerals, or the ventilation or drainage of his mine or otherwise in connection with the working of the minerals."

The appellant demised the coal mines on her property to lessees who were also empowered to convey over roads or railways on the appellant's land coal worked by them in certain "foreign" mines, that is, mines not the property of the appellant, and in respect of this privilege the lessees had, by virtue of the lease, to pay a rent to the appellant. Some of the coal worked by the lessees in the foreign mines was brought to bank partly on the appellant's land and partly elsewhere:—

Held, that under s. 20 of the Finance (1909-10) Act, 1910, in the case of a mineral way-leave, mineral rights duty is payable on the amount of rent paid by the working lessee in respect of the way-leave whether that relates to minerals which are the property of the person assessed or not, and, therefore, that mineral rights duty was payable by the appellant on the rent received by her from her lessees in respect of the right to convey coal from the foreign mines over her land.

Special Case stated by a referee under the Finance (1909–10) Act, 1910.

The appellant, Mrs. Shawe Storey, was assessed to mineral rights duty under s. 20 of the Finance (1909–10) Act, 1910 (1),

(1) Sect. 20, sub-s. 1, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), imposes a duty called mineral rights duty on the rental value of all rights to work minerals and of all mineral way-leaves.

Sub-s. 2: "The rental value shall be taken to be—

"(*a*) Where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working

1913

SHAWE STOREY v. INLAND REVENUE COMMISSIONERS.

for the year ending March 31, 1912, in the sum of 233*l.* 16*s.*, against which assessment she appealed to a referee before whom the following facts were proved or admitted:—

By an indenture dated October 29, 1908, the appellant demised to the Cramlington Coal Company for a term of thirty-two years certain coal mines and seams of coal in the parish of Cramlington, Northumberland, together with the right to make and use all pits, shafts, &c., as were necessary and proper for working and carrying on as well the demised mines as any other mine or mines which for the time being should be wrought in connection therewith, which other mines were referred to as the foreign mines, and together also with the right to convey over any roads or railways for the time being used or made by virtue of the indenture all or any part of the produce of the foreign mines. The lessees were to pay (*a*) a yearly rent for the privilege of working the demised mines; (*b*) certain amounts per ton for the privilege of carrying over any road or railway made or used by virtue of the indenture the coal the produce of the foreign mines as should be led over such roads or railways but not brought to bank at any pit, adit, or level of the demised mines; and (*c*) certain amounts per ton in respect of coal worked from the foreign mines and brought to bank at any pit, adit, or level of the demised mines.

Included in the amount received by the appellant under the lease and on which mineral rights duty was assessed was a sum of 436*l.* 7*s.* 11*d.* received by her in respect of coal belonging to other owners, but which was brought to bank at collieries situate on her property; and a further sum of 351*l.* 9*s.* 4*d.*

---

year in respect of that right; and . . . .

"(*c*) In the case of a mineral way-leave, the amount of rent paid by the working lessee in the last working year in respect of the way-leave."

Sect. 24: "For the purpose of the provisions of this Act as to minerals—

" . . . . . .

"The expression 'mineral way-leave' means any way-leave, air-leave, water-leave, or right to use a shaft granted to or enjoyed by a working lessee, whether above or under ground, for the purpose of access to or the conveyance of the minerals, or the ventilation or drainage of his mine or otherwise in connection with the working of the minerals."

received by her in respect of coal (not her property) brought to bank at collieries not situate on her property but led over roads on her property.

It was contended on behalf of the appellant that the sections of the Finance (1909-10) Act, 1910, relating to mineral rights duty only related to minerals actually demised, and particularly that the use of the words "the minerals" in s. 24 denoted specific minerals and not "any minerals"; and that the said sums of 436*l.* 7*s.* 11*d.* and 351*l.* 9*s.* 4*d.* were not for way-leaves within the definition of "mineral way-leave" in s. 24, because they did not relate to the demised minerals.

It was contended for the respondents that the sums of 436*l.* 7*s.* 11*d.* and 351*l.* 9*s.* 4*d.* were properly included in the sum on which the assessment was made.

The referee decided that the said two sums were properly included in the amount on which the assessment was made, and the question for the opinion of the Court was whether he was right in so deciding.

Danckwerts, K.C. (*William Allen* with him), for the appellant. The question is whether the appellant is liable to mineral rights duty on the two sums of 436*l.* 7*s.* 11*d.* and 351*l.* 9*s.* 4*d.*, neither of which is paid in respect of coal taken from the demised mines. It is said for the Crown that the two sums are paid in respect of a mineral way-leave; but a "mineral way-leave" is defined in s. 24 of the Finance (1909-10) Act, 1910, as meaning any way-leave, &c., "granted to or enjoyed by a working lessee, ... for the purpose of access to or the conveyance of the minerals, or the ventilation or drainage of his mine or otherwise in connection with the working of the minerals." It is to be noted that the phrase there used is "the minerals." Effect must be given to the word "the," and the only way to do so is to read it as referring to the minerals demised by the lease. The contention for the Crown gives no effect whatever to the word "the." The object of s. 20 is to tax the proprietors of minerals, and unless the appellant's contention is adopted a mineral owner who leases his minerals is in a worse position than the owner who works his minerals himself, for the latter

1913

SHAWE STOREY v. INLAND REVENUE COMMISSIONERS.

would pay duty under s. 20, sub-s. 2 (*b*), on the hypothetical rent of the mine and would pay nothing in respect of a way-leave. A construction involving such an inequality of treatment cannot be right.

Sir John Simon, *A.-G.*, and *W. Finlay*, for the respondents, were not called upon.

SCRUTTON J. This question comes before me on a special case stated by a referee with reference to mineral rights duty payable by Mrs. Shawe Storey. Mrs. Shawe Storey owns land in Northumberland, in respect of which she entered into a mining lease with the Cramlington Coal Company. During the year of assessment she received by virtue of that lease a sum of 4966*l.*, and it is in reference to two sums included in that amount that the question in this case arises. One of those sums—351*l.* 9*s.* 4*d.*—was paid in respect of coal not belonging to Mrs. Shawe Storey but carried over her land. The other sum—436*l.* 7*s.* 11*d.*—was paid in respect of coal not belonging to Mrs. Shawe Storey which was partly carried through her land and brought to bank on her land. Having been assessed in respect of those two sums for mineral way-leaves, she appealed to the referee, contending that mineral rights duty was not payable in respect of minerals not her property, although carried over her property under mineral way-leaves. The referee decided that the two sums were rightly included in the assessment, whereupon this appeal was brought.

Mr. Danckwerts for the appellant contended that so far as mineral rights duty is composed of duties on mineral way-leaves, it can only be levied in respect of minerals which are the property of the person assessed. That depends upon the construction of certain sections of the Finance (1909-10) Act, 1910. Sect. 20 imposes mineral rights duty on all mineral way-leaves at the rate of 1*s.* per 20*s.* of rental value. "Rental value" is then defined, and as applied to mineral way-leaves it is "the amount of rent paid by the working lessee in the last working year in respect of the way-leave." Two of the terms used in s. 20, namely, "working lessee" and "mineral way-leave," are defined in s. 24, and reading those definitions into s. 20, sub-s. 2 (*c*), the duty, in the case of a mineral way-leave, is to be levied on the amount of

rent paid by the working lessee who is in actual enjoyment of any way-leave, water-leave, or right to use a shaft granted to or enjoyed by the working lessee, whether above or under ground, for the purpose of access to or the conveyance of the minerals. Mr. Danckwerts contends that the expression "the minerals" in the definition of "mineral way-leave" in s. 24 points to the minerals worked by the lessee under the mining lease. I am unable to agree with that contention. I find that the duty is to be levied on all mineral way-leaves; the Act does not say that the duty is to be levied on all mineral way-leaves which relate to the minerals belonging to the grantor. I find that in this case there is a mining lease which grants certain way-leaves with regard to certain coal; it grants the right to carry over roads and railways on the grantor's land the produce of external or, as they are called, foreign mines, and the right to bring that coal up through shafts; it imposes a payment for the privilege of carrying the foreign coal over roads and railways on the grantor's land through shafts on the grantor's land, for the use of water on the grantor's land, for the surface way-leaves on the grantor's land, and for outstroke on the grantor's land. Why do not these matters come within the words in s. 20, sub-s. 1, "all mineral way-leaves"? It is a way-leave; it is a way-leave for minerals referred to in the mining lease; it is granted by a mining lease; it is a matter which the grantor had power to grant; and I am unable to find in the use of the word "the" in the definition of "mineral way-leave" in s. 24 anything to restrict it to the minerals the property of the grantor. It seems to me that the word "the" is equally satisfied by reading it as "the minerals referred to in the mining lease" or "the minerals in respect of which the rent for the mineral way-leave is paid." Either of these definitions gives a satisfactory meaning to the word "the." That being so, I am of opinion that these two sums paid as rents for way-leaves cannot be excluded from the amount on which mineral rights duty is payable. I do not decide what is to happen when the grantor himself works the minerals instead of granting a mining lease in respect of them, and whether in that case any exclusion is to be made of way-leaves under s. 20, sub-s. 2 (*b*). I am only deciding the case actually before me, that of a person who has granted

1913

SHAWE STOREY v. INLAND REVENUE COMMISSIONERS.

the right to work coal under her land, to carry coal from other mines under and over her land, and to bank it on her land. I think the referee was right, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rawle, Johnstone & Co., for Weld & Weld, Liverpool.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

1913
Oct. 14.

ROYAL COLLEGE OF VETERINARY SURGEONS *v.* KENNARD.

Veterinary Surgeon—Qualified Person—Use of Description by Unqualified Person stating Special Qualification—Description of Premises where Business is carried on—"Canine Surgery"—Veterinary Surgeons Act, 1881 (44 & 45 *Vict. c.* 62), *s.* 17, *sub-s.* 1.

By the Veterinary Surgeons Act, 1881, s. 17, sub-s. 1, any person not possessing the prescribed qualification who after December 31, 1883, "takes or uses . . . . any name, title, addition, or description, stating that he is a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

The respondent, who was not possessed of the qualifications specified by the section, exhibited over the entrance door to his residence a lamp on which was inscribed "A. E. Kennard, Canine Surgery," and on the wall of the premises a brass plate bearing the inscription "Canine Surgery. A. E. Kennard":—

Held, that these words did not constitute a description stating that the respondent was specially qualified to practise a branch of veterinary surgery, and that he was not liable to a fine under the section.

CASE stated by justices for the county of Glamorgan.

At a Court of summary jurisdiction sitting at Llandaff an information was preferred by Wesley Bramwell Howe, on behalf of the Royal College of Veterinary Surgeons (hereinafter called "the appellants"), against Albert Edward Kennard (hereinafter called "the respondent") for that he the respondent not being on the register of veterinary surgeons and not holding at the time of the passing of the Veterinary Surgeons Act, 1881, the veterinary certificate of the Highland and Agricultural Society

of Scotland, did on December 13, 1912, at "Harborne," Evansfield Road, in the parish of Llandaff, unlawfully take and use an addition and description, to wit, "Canine Surgery," thus stating that he was specially qualified to practise a branch of veterinary surgery contrary to s. 17 of the Veterinary Surgeons Act, 1881. (1)

Upon the hearing of the information the following facts were proved or admitted. The authority of the council of the Royal College of Veterinary Surgeons under the corporate seal of the college to the institution of these proceedings had been duly obtained pursuant to s. 19 of the Veterinary Surgeons Act, 1881. The respondent was not at the date of the act complained of on the register of veterinary surgeons and did not at the time of the passing of the Act of 1881 hold the veterinary certificate of the Highland and Agricultural Society of Scotland. The respondent being on December 13, 1912, the occupier of the premises called "Harborne," on that date caused or permitted to be exhibited over the entrance door to the premises a red glass lamp on which were inscribed the letters and words "A. E. Kennard, Canine Surgery," and also caused or permitted to be exhibited on the wall of the premises a brass plate bearing the inscription "Canine Surgery. A. E. Kennard."

On the part of the appellants it was contended that the words "canine surgery" standing alone must imply either that a person duly qualified within the meaning of the Act or specially qualified to practise veterinary surgery would be found within the "surgery," or that coupled with the name of the respondent the words could only mean that the respondent was such a person.

For the respondent it was contended that the fair and only reasonable construction of the words was that surgical treatment

(1) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1: "If after the 31st day of December, 1883, any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description, stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine . . . ."

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

could be rendered on the premises by a person therein, and that there was no statement as to any qualification at all or description of the respondent as a qualified person.

The attention of the justices was particularly called on behalf of the respondent to the difference between the wording of ss. 16 and 17 of the Act and to the omission from s. 17 (under which the information was expressly laid) of the words "or implying" which appear in the former section, and it was also contended that the description must be a personal one and not one applicable to a place.

The attention of the justices was also called by the parties to the following cases: *Royal College of Veterinary Surgeons* v. *Robinson* (1) and *Royal College of Veterinary Surgeons* v. *Collinson.* (2) They also referred to *Attorney-General* v. *Churchill's Veterinary Sanatorium, Ld.* (3) and *Royal College of Veterinary Surgeons* v. *Groves.* (4) Also to a case decided on the very similarly worded s. 3 of the Dentists Act, 1878 (41 & 42 Vict. c. 33) (which section, however, contains the word "implying"), namely, *Bellerby* v. *Heyworth* (5), this latter case having particular bearing on the personal application of the description.

The justices distinguished *Robinson's Case* (1) on the ground that in the descriptive words there complained of, namely, "J. Robinson, Veterinary Forge," the word "veterinary" is one of the particular words used in the Act of 1881 and is also primarily and in its ordinary sense descriptive of a person and not of a place; and *Collinson's Case* (2) and *Churchill's Case* (3) on the ground that in each of those cases the descriptive words were wholly or partly personal and that the word "specialist" appeared in the descriptive words.

The justices therefore dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Morton Smith, for the appellants. The words used by the respondent mean that the place was a surgery at which he was

(1) [1892] 1 Q. B. 557.
(2) [1908] 2 K. B. 248.
(3) [1910] 2 Ch. 401.
(4) (1893) 57 J. P. 505.
(5) [1910] A. C. 377.

conducting the business usually conducted by a veterinary surgeon. The object of the Veterinary Surgeons Act, 1881, as recited in the preamble is "to enable persons requiring the aid of a veterinary surgeon . . . . to distinguish between qualified and unqualified practitioners." If a person uses words which state that he is practising or is qualified to practise or has a surgery at which he practises, he commits an offence under s. 17 of the Act of 1881: *Royal College of Veterinary Surgeons* v. *Collinson* (1), approved in the Court of Appeal by Buckley L.J. in *Bellerby* v. *Heyworth*. (2) The words used by the respondent were not a mere description of the place, but of the person attached to it. The words mean that the respondent is carrying on a branch of veterinary surgery and that he is specially qualified to practise canine surgery. In *Royal College of Veterinary Surgeons* v. *Robinson* (3) it was held that the words "veterinary forge" were within the mischief aimed at by s. 17 of the Act of 1881, although that decision has perhaps been shaken by the observations of Lord Alverstone C.J. in *Collinson's Case*. (1) Buckley L.J., however, in *Bellerby* v. *Heyworth* (2) says that the decision in *Robinson's Case* (3) may have been right. The present case is governed by the decision in *Collinson's Case*. (1) *Bellerby* v. *Heyworth* (4) turned upon the construction of s. 3 of the Dentists Act, 1878, a statute dealing with the registration of dentists. In *Emslie* v. *Paterson* (5), where the charge was under s. 3 of the Dentists Act, 1878, the plates used by the accused did not denote that he was the operator, as does the brass plate used by the respondent. Sect. 3 of the Dentists Act, 1878, corresponds to s. 16 of the Veterinary Surgeons Act, 1881, not to s. 17, under which the information against the respondent was laid. [*Attorney-General* v. *Churchill's Veterinary Sanatorium, Ld.* (6) and the judgment of Lord Loreburn L.C. in the House of Lords in *Bellerby* v. *Heyworth* (4) were also referred to.]

A. R. Thomas, for the respondent. The only case in which a place has been described and the person using the description has

(1) [1908] 2 K. B. 248.
(2) [1909] 2 Ch. 23.
(3) [1892] 1 Q. B. 557.
(4) [1910] A. C. 377.
(5) (1897) 24 R. (Just. Cas.) 77.
(6) [1910] 2 Ch. 401.

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

been convicted is *Royal College of Veterinary Surgeons* v. *Robinson*. (1) That decision is shaken by the observations of Lord Alverstone C.J. and Darling J. in *Royal College of Veterinary Surgeons* v. *Collinson*. (2) The words used by the respondent do not amount to a statement that he is specially qualified. They are merely a description of the place. The language of the Dentists Act, 1878, is stronger than that of the Veterinary Surgeons Act, 1881, for it forbids a name, title, or description "implying that . . . . he is a person specially qualified to practise dentistry." There are no words in the Act of 1881 referring to any implication. The expression "canine surgery" does not apply to a person. The word "specialist" might imply that a person had the qualification, and upon that ground *Royal College of Veterinary Surgeons* v. *Collinson* (2) is distinguishable. The expression "canine surgery" is not the same as "canine surgeon." A surgeon is a person versed in the art of surgery, but the word "surgery" in its modern signification may mean a place where slight affections —e.g., a cold—are treated. The words used by the accused in *Emslie* v. *Paterson* (3), where the conviction was quashed by the Court of Justiciary, are practically identical with those used by the respondent in the present case. *Barnes* v. *Brown* (4) was overruled by the House of Lords in *Bellerby* v. *Heyworth*. (5) A description of the work a person does is not sufficient to bring him within s. 17 of the Act of 1881. [*Royal College of Veterinary Surgeons* v. *Groves* (6) was also referred to.]

Morton Smith in reply. If the respondent had used the words "canine surgeon" he would clearly have committed an offence, and the words "canine surgery" are equally within s. 17 of the Act of 1881, for they mean a place where a canine surgeon carries on his business.

RIDLEY J. In this case the point raised is one of a difficult nature, for the distinctions between the various decisions are rather fine; and perhaps it is difficult to reconcile all of them. The justices in the present case, after having considered the

(1) [1892] 1 Q. B. 557.
(2) [1908] 2 K. B. 248.
(3) 24 R. (Just. Cas.) 77.
(4) [1909] 1 K. B. 38.
(5) [1910] A. C. 377.
(6) 57 J. P. 505.

authorities cited before them, came to the conclusion that the words used by the respondent were not within the provisions of s. 17 of the Veterinary Surgeons Act, 1881. The words used by the respondent were "A. E. Kennard, Canine Surgery," on a red glass lamp, and also upon the wall of the premises a brass plate bearing the inscription "Canine Surgery. A. E. Kennard."

That being the state of things, it was contended on behalf of the appellants that under s. 17 of the Veterinary Surgeons Act, 1881, the respondent had done an act which came within the provisions of the section and which rendered him liable to a fine not exceeding 20*l*. The words of that section, so far as they are material, are: "If . . . . any person, other than a person who . . . . is on the register of veterinary surgeons, ... takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description, stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine . . . ."

The question for our decision is not without authority. The first case which I desire to refer to is *Royal College of Veterinary Surgeons* v. *Robinson* (1), decided in 1892, where it was held that "veterinary forge" came within the statute and meant that the person who used the words was claiming for himself that he was a practitioner of veterinary surgery.

In 1908 *Royal College of Veterinary Surgeons* v. *Collinson* (2) came up for decision in the Divisional Court, and it was held that the words "canine specialist, dogs and cats treated for all diseases," also came within s. 17 of the Veterinary Surgeons Act, 1881. I was a member of that Court; Lord Alverstone C.J. and my brother Darling were the other two members. We, the puisne judges, agreed with some hesitation with the judgment of the Lord Chief Justice, who had a decided opinion that the words "canine specialist, dogs and cats treated for all diseases" did constitute a claim, by the person who used them, that he was specially qualified to practise the treatment of diseases of dogs, and that he therefore came within the words of the section

(1) [1892] 1 Q. B. 557. (2) [1908] 2 K. B. 248.

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

Ridley J.

and was liable to the penalty. We, on the other hand, had some doubts on the matter, but we agreed with the judgment of the Lord Chief Justice.

If there were no more recent decisions, what would be the position of the Court to-day? There are no such words here as "canine specialist"; there are the words "Canine Surgery. A. E. Kennard." If a person uses those words, does he do that which Lord Alverstone C.J. relied upon in giving judgment in *Collinson's Case* (1) and which we followed? Does he indicate that he is specially qualified to practise the art or skill of a veterinary surgeon in treating the diseases of dogs? We should have had to consider that point, and to determine whether the present case was distinguishable from *Collinson's Case* (1), because the word was "surgery" and not "surgeon"; in other words, whether, because the respondent instead of using the expression "canine specialist," which amounts to saying that the person who was practising there was a specialist in the diseases of dogs, had used the expression "canine surgery," he had incurred no penalty under the Act upon the ground that the expression means the place itself in which dogs are treated. I think it would have been a very arguable point, and I am not quite sure that I would on my own view have thought that there was a distinction. It is the person who asserts that he has special qualifications, not the place at which he practises, with which the Veterinary Surgeons Act, 1881, deals. We have to deal with s. 17, the penal clause. Would it have been right to hold that if it is his own personal skill that he is claiming to possess he is within the statute, but that if he refers to a place used for a canine surgery he is not? It seems, however, that *Bellerby* v. *Heyworth* (2) in the Court of Appeal is very important upon this point. I think we have in the judgments in that case the authority of the Court of Appeal, and particularly of Buckley L.J., for saying that that is a good and substantial distinction. The judgment of Buckley L.J. rests a good deal upon the Scotch case of *Emslie* v. *Paterson* (3), and whilst approving of the judgment in that case, he points out and rests his judgment upon the distinctions I

(1) [1908] 2 K. B. 248. (2) [1909] 2 Ch. 23.
(3) 24 R. (Just. Cas.) 77.

have suggested. He says: "Now in reading those words it is to be observed that they are confined to forbidding descriptions of the person as distinguished from descriptions of the acts to be done by the person"; and the concluding words of his judgment are: "I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist." In *Emslie* v. *Paterson* (1) we find that the words "American dentistry, dental office," were held not to be within the Dentists Act, 1878. I am not able to draw a distinction between the present case and *Emslie* v. *Paterson* (1) in respect of this matter. There is a slight difference between the language of the Dentists Act, 1878, and that of the Veterinary Surgeons Act, 1881, but for this purpose I am not able to distinguish the statutes. If the words "American dentistry" and "dental office" do not mean that the person was taking upon himself the name, title, or addition, or that he had a special qualification, I do not quite see how the words "canine surgery" can do so. The expression "canine surgery" is a description of the place and not of the person. A person is forbidden to call himself certain things. He must not call himself a dentist, but it does not follow that he is not to put up an announcement that he has a surgery. It will no doubt be said that the distinction is rather fine, and I think it is, but it has the authority of the Court of Appeal in *Bellerby* v. *Heyworth*. (2) Therefore according to that decision there is a distinction to be drawn between the present case and that of *Royal College of Veterinary Surgeons* v. *Collinson* (3), in which the person said he was a canine specialist. In the present case the respondent has not said that he is a canine specialist. He has used words equivalent to those in *Emslie* v. *Paterson* (1), namely, "American dentistry" and "dental office," for he has merely put up "Canine Surgery, A. E. Kennard." For this reason, therefore (though with some hesitation), I think the justices were right.

SCRUTTON J. The respondent placed upon a red lamp over his door the words "A. E. Kennard. Canine Surgery." Thereupon

(1) 24 R. (Just. Cas.) 77. (2) [1909] 2 Ch. 23.
(3) [1908] 2 K. B. 248.

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

Scrutton J.

the appellants, the Royal College of Veterinary Surgeons, summoned him for taking and using the addition and description of "canine surgery," thus stating that he was specially qualified to practise a branch of veterinary surgery contrary to s. 17 of the Veterinary Surgeons Act, 1881. The justices dismissed the information. I have, after some hesitation, arrived at the same conclusion as my Lord that the justices were right. I am not certain that it is very profitable to give a judgment of any length, because the only result will be that some other ingenious unregistered practitioner will appear with a new form of words which he thinks he has extracted from some sentence in the judgment of one of the members of the Court; but as I think I have arrived at a principle satisfactory to myself upon which the Veterinary Surgeons Act, 1881, should be construed, and as I have considered the authorities, I propose to state shortly the result of my consideration.

The Royal College of Veterinary Surgeons appears to have two registers, one of veterinary surgeons who have passed an examination, and one of existing practitioners who have not passed an examination, but who had for five years before the passing of the Veterinary Surgeons Act, 1881, practised veterinary surgery. Sect. 16 of the Act forbids any person who is not a fellow or a member taking or using any name, title, addition, or description stating or implying that he is a fellow or a member. That comes into effect on the passing of the Act in 1881. Sect. 17 for some reason comes into operation more than two years later and prohibits persons not on the register of veterinary surgeons from taking or using the title of "veterinary surgeon" or "veterinary practitioner," or "any name, title, addition, or description, stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same." I think s. 17 must go further than s. 16. It comes into operation at a different time, and I therefore do not think that taking or using the title of "veterinary surgeon" or "practitioner" can be limited to statements that the person is on the two existing registers. Those statements are I think dealt with by s. 16. Then comes the question what is the offence larger or different from that dealt with by s. 16

which a person commits under s. 17 by taking the name, title, addition, or description, or the statement that he is specially qualified to practise? It is to be observed that it is not an offence to perform a veterinary operation. The only result of not being on the register of the Royal College of Veterinary Surgeons is that the operator cannot recover a fee for performing it, a difficulty which he usually surmounts by taking cash in advance. If a person is allowed to perform an operation it would be very curious if a statute has prevented him from saying that he is ready to perform it. I should therefore approach s. 17 of the Act of 1881 with the feeling that it is improbable that a person is prohibited from saying that he is ready to perform an operation when by law he is permitted to perform it but cannot recover fees for it.

The effect of the authorities is, shortly, this: In 1892 a Divisional Court held in *Royal College of Veterinary Surgeons* v. *Robinson* (1) that the words "veterinary forge" implied that the person using them possessed special qualifications to practise a branch of veterinary surgery. In 1908, in *Collinson's Case* (2), all three judges sitting as a Divisional Court said that they would have decided *Robinson's Case* (1) the other way; and two of them said that, but for the fact that the president of the Court took the opposite view, they would have decided *Collinson's Case* (2) the other way, and, with hesitation, they followed him. The words in *Collinson's Case* (2) were "Canine specialist. Dogs and cats treated for all diseases." There can be no doubt those words constitute a description of the personal qualifications of the exhibitor of the words. They state that he is a specialist, and I can quite understand the Court holding that a person who calls himself a specialist says that he is specially qualified to practise. He does not merely say "I am ready to practise"; he says "I am a specialist, I am specially qualified to practise." At the time of the decision in *Collinson's Case* (2) Lord Alverstone C.J. no doubt took the view that the words "specially qualified" in s. 17 of the Veterinary Surgeons Act, 1881, were not limited to the qualifications necessary to be registered, but that they mean, in the popular sense, qualifications other than

(1) [1892] 1 Q. B. 557. (2) [1908] 2 K. B. 248.

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

Scrutton J.

the mere fact of registration, i.e., qualifications by skill. Later in the same year Lord Alverstone C.J., was the presiding judge in the Divisional Court which had the case of *Barnes* v. *Brown* (1) under the Dentists Act, 1878, before it. Barnes had exhibited notices containing the words "Finest artificial teeth at moderate price. Extractions, Advice free . . . . Painless extractions," and Lord Alverstone C.J., citing in support of his view *Robinson's Case* (2) and *Collinson's Case* (3), held that the words "specially qualified" in s. 3 of the Dentists Act, 1878, were not limited to registration under the statute, but extended to the popular meaning of "specially qualified," i.e., special personal qualifications to practise. In the following year *Barnes* v. *Brown* (1) came under the review of the Court of Appeal in *Bellerby* v. *Heyworth* (4), and that Court, acting on the principle which I have endeavoured to state—namely, that it is extremely improbable that Parliament can have intended to punish a person for saying that he will perform an operation which he has a legal right to perform—declined to follow the judgment in *Barnes* v. *Brown* (1), declined to hold that a statement of the possession of special qualification was implied in a statement that a person would do work, and Cozens-Hardy M.R. adopted the language of the Lord Justice-Clerk in *Emslie* v. *Paterson* (5) where he said: "If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry." Cozens-Hardy M.R. continued: "It is needless to say that I have considered what was said by the Lord Chief Justice and Bigham J. in that case"—i.e., *Barnes* v. *Brown* (1)—"with the utmost respect, but I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do, and do well, that which the law entitles them to do they are necessarily infringing the Act. I can find

(1) [1909] 1 K. B. 38.
(2) [1892] 1 Q. B. 557.
(3) [1908] 2 K. B. 248.
(4) [1909] 2 Ch. 23.
(5) 24 R. (Just. Cas.) 77.

no such personal description, either expressed or implied, in what has been done here as brings the case within the section."

That being the decision of the Court of Appeal, the case was taken to the House of Lords, and the House of Lords in 1910 (1) affirmed the decision of the Court of Appeal, overruled the decision in *Barnes* v. *Brown* (2), which had proceeded on the decision in *Collinson's Case* (3), and held that the words "specially qualified to practise dentistry" in s. 3 of the Dentists Act, 1878, were limited to the possession of qualifications for registration. In view of the fact that there are two sections in the Veterinary Surgeons Act, 1881, each relating to a forbidden user of a name, title, addition, or description, namely, ss. 16 and 17, and only one section, namely, s. 3, in the Dentists Act, 1878, I do not think it is necessary to say that the words "specially qualified" in s. 17 of the Veterinary Surgeons Act, 1881, are limited to qualifications for registration. But in view of the reasoning of the Court of Appeal in *Bellerby* v. *Heyworth* (4) and of the House of Lords in the same case (1) overruling the decision in *Barnes* v. *Brown* (2), I think that in order to constitute an offence under s. 17 of the Veterinary Surgeons Act, 1881, there must be more than a mere statement that a person is ready to do what by law he is entitled to do. There must be some statement that he is specially personally qualified to undertake the work—not merely ready to do it, but specially personally qualified to undertake it. Is that statement comprised in the words "canine surgery"? They appear to me to amount to nothing more than the statement "Here is a place where surgical operations will be performed on dogs." A person is at liberty to perform surgical operations. It will be no offence under the statute if he does perform a surgical operation there, but he must not say he is specially qualified to do so. Does he say he is specially qualified to do so by saying he is ready to do so? In my judgment the reasoning of the Court of Appeal (4) and House of Lords (1) in *Bellerby* v. *Heyworth* and of the

(1) [1910] A. C. 377.
(2) [1909] 1 K. B. 38.
(3) [1908] 2 K. B. 248.
(4) [1909] 2 Ch. 23.

1913

ROYAL COLLEGE OF VETERINARY SURGEONS v. KENNARD.

Scrutton J.

Scotch Court in *Emslie* v. *Paterson* (1) bind me to hold—although I quite agree with it without being bound—that the statement is not one that the respondent possesses special qualification, but it is a statement of readiness to do what by law he is entitled to do. For these reasons I think the justices were right in holding that in this case there was no offence shewn under the Veterinary Surgeons Act, 1881.

BAILHACHE J. I am of the same opinion. I think the result of the authorities is that it is no offence to say "I have a canine surgery," though it probably is an offence to say "I am a canine surgeon." I therefore agree with the judgments which my brothers have delivered.

Appeal dismissed.

Solicitors for appellants: *G. Thatcher & Son.*

Solicitors for respondent: *Gibson & Weldon, for W. Stephen Davis, Cardiff.*

(1) 24 R. (Just. Cas.) 77.

J. E. A.

OWNER, Appellant *v.* BEE HIVE SPINNING COMPANY, LIMITED, Respondents. 1913 *Oct.* 20.

Factory Acts—Offence—Times allowed for Meals—Notice to be affixed in Factory—Proof of Contents—Admissibility of Secondary Evidence—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 32, 33, 128.

On the prosecution of the occupier of a factory for allowing a young person employed in the factory to remain in a room in which a manufacturing process was being carried on during the time allowed for meals, contrary to s. 33 of the Factory and Workshop Act, 1901, secondary evidence is admissible to prove the contents of the notice specifying the times allowed in the factory for meals, which notice has under s. 32 to be affixed in the factory, although there has been no notice to produce the original notice.

Mortimer v. *M'Callan* (1840) 6 M. & W. 58, followed and applied.

Case stated by justices for the county borough of Bolton in the county of Lancaster.

The respondents, the Beehive Spinning Company, Limited, were charged on an information laid by the appellant, an inspector of factories, for that they on April 1, 1913, were the occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1901 and 1907, and that on the said date one Jane Aspinall, a young person within the meaning of the said Acts, was employed therein contrary to the provisions of the said Acts, that is, was during a part of the time allowed for meals in the said factory allowed to remain in a room in which a manufacturing process or handicraft was then being carried on. (1)

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 32: "(1.) The occupier of every factory and workshop may fix within the limits allowed by this Act and shall, subject to any special exceptions made by or in pursuance of this Act, specify in a notice which must be affixed in the factory or workshop— . . . .

"(*b*) The times allowed for meals;

" . . . . . ."

Sect. 33: "With respect to meals the following regulations shall (save as in this Act specially excepted) be observed in a factory and workshop:— . . . . (2.) A woman, young person or child shall not, during any part of the times allowed for meals in the factory or workshop, be employed in the factory or the workshop or be allowed to remain in a room in which a manufacturing

1913

OWNER v. BEE HIVE SPINNING COMPANY, LIMITED.

Upon the hearing of the information the appellant sought to give evidence of the contents of the printed abstract which was affixed in the factory in accordance with s. 128 of the Factory and Workshop Act, 1901, and which included the notice specifying as required by s. 32 of the Act the period of employment and times allowed for meals in the factory. This abstract was not produced and the appellant admitted that he had not given notice to the respondents to produce it.

The solicitor for the respondents submitted as a point of law that as no notice to produce the abstract had been served secondary evidence of its contents could not be given. It was, he stated, an ordinary printed document simply hung upon the wall, and could easily have been produced had notice to produce been given. It was further submitted that another similar abstract could have been substituted therefor in order to comply with s. 128 of the Act of 1901. The appellant admitted that the abstract was a form hung up in the office or elsewhere and was movable.

The appellant contended that he was entitled to give secondary evidence of the contents of the abstract notwithstanding that he had not given notice to produce it, as it was a document which by s. 128 of the Act of 1901 was required to be constantly kept affixed in the factory, and was, therefore, not a document that could be produced in Court.

The justices came to the conclusion that the abstract could have been produced and was subject to the ordinary principles

---

process or handicraft is then being carried on."

Sect. 128: "(1.) There shall be affixed at the entrance of every factory . . . . and be constantly kept so affixed in the prescribed form and in such position as to be easily read by the persons employed in the factory or workshop— . . . .

"(*e*) every notice and document required by this Act to be affixed in the factory or workshop.

"(2.) In the event of a contravention of this section in a factory or workshop, the occupier of the factory or workshop shall be liable to a fine not exceeding forty shillings."

Sect. 137, sub-s. 1, imposes a fine for employing a person in a factory contrary to the Act, and by sub-s. 2, if a young person, during any part of the times allowed for meals, is, in contravention of the provisions of the Act, employed in the factory, or allowed to remain in any room, the young person shall be deemed to be employed contrary to the provisions of the Act.

1913

OWNER v. BEE HIVE SPINNING COMPANY, LIMITED.

of the law of evidence even although the respondents would be subject to a penalty if they removed it from the factory, and on the ground that no notice to produce it had been given they refused to allow secondary evidence to be given of its contents, and they dismissed the information for lack of evidence as to the time fixed as the time allowed for meals.

The question for the opinion of the Court was whether the decision of the justices on the point of law was correct.

Branson, for the appellant. For the purpose of proving the offence charged against the respondents it was necessary for the prosecution to adduce evidence of the time allowed in the respondents' factory for meals. By s. 32 the time has to be specified in a notice which must be affixed in the factory. It was impossible to produce the original notice, for if the notice were to be removed from the factory the respondents would commit an offence under s. 128. The case is, therefore, one in which (although no notice to produce had been given) secondary evidence of the contents of the notice was admissible in accordance with the principle laid down in *Mortimer* v. *M'Callan* (1), where Lord Abinger C.B., referring to the books of the Bank of England, said that it had been established by a series of decisions that "copies of them might be received in evidence. It was founded upon the principle, that the public inconvenience, from the removal of documents of that sort, would justify the introduction of secondary evidence."

Ellis Hill, for the respondents. The justices were right in rejecting secondary evidence of the contents of the notice. The contents of a written document may be proved by secondary evidence "when its production is either physically impossible or highly inconvenient . . . . In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed to the freehold and cannot easily be removed": Taylor on Evidence, 9th ed., pp. 308, 309. The present case does not come within that principle. The justices have found as a fact that it was possible to produce the notice; and its production in Court would not have involved a

(1) 6 M. & W. 58, at p. 67.

1913

OWNER v. BEE HIVE SPINNING COMPANY, LIMITED.

contravention of s. 128. The Act could have been complied with by putting up another notice. If the Legislature had intended to alter the ordinary rules of evidence in this matter the Act would have contained an express provision to that effect, as it does in s. 147 in the case of the proof of a child's age. [He referred to *Jones* v. *Tarleton*. (1)]

RIDLEY J. No doubt it is the ordinary and very proper rule of evidence that before secondary evidence can be given of the contents of a written document which is in the possession of the other side a notice to produce the original must be given. But in my opinion the justices were wrong in applying that rule to this particular case, for the facts bring it within the exception which permits secondary evidence to be given in cases where the production of the original document would be either physically impossible or highly inconvenient. We have been referred to the case of *Mortimer* v. *M'Callan*. (2) In the course of that case it became necessary to prove that an entry in the books of the Bank of England relating to a transfer of stock had been signed by the defendant. An examined copy of the Bank books was produced, and a witness was called who said he had seen the signature in the books at the Bank and that it was in the handwriting of the defendant. It was contended that the books themselves ought to have been produced. The Court held that the removal of the books from the Bank would be so inconvenient that copies of them might be received in evidence. Lord Abinger in the course of his judgment said (3): "A case has been aptly put by my brother Alderson, that if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in Court?" The present case appears to me to be somewhat akin to that, for s. 128 of the Factory and Workshop Act, 1901, enacts that this notice shall be kept constantly affixed at the factory, and a breach of that provision renders the occupier of the factory liable to a fine. In my opinion *Mortimer* v. *M'Callan* (2) is an authority for

(1) (1842) 9 M. & W. 675. (2) 6 M. & W. 58.
(3) 6 M. & W. at p. 68.

saying that secondary evidence of the contents of this notice ought to have been accepted. The appeal will, therefore, be allowed, and the case must be remitted to the justices for them to deal with it on the facts.

1913

OWNER v. BEE HIVE SPINNING COMPANY, LIMITED.

SCRUTTON J. I agree.

BAILHACHE J. I agree.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Hall & Son, Bolton.*

F. O. R.

HUISH *v.* JUSTICES OF LIVERPOOL.

1913
Oct. 21.

Justices—Power to state Case—Application for Cinematograph Licence—Justices "sitting in petty sessions"—Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 2—*Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Cinematograph Act,* 1909 (9 *Edw.* 7, *c.* 30), *ss.* 2, 5, 6.

By s. 2 of the Cinematograph Act, 1909, county councils are empowered to grant cinematograph licences, and by s. 5 it is provided that a county council may "delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act."

Sect. 6 enacts that the provisions of the Act are to apply in the case of a county borough as if the borough council were a county council:—

Held, that justices sitting in petty sessions to whom the powers of a county or borough council under the Act have been delegated do not, when exercising such powers, sit as a Court of summary jurisdiction, and, therefore, that they have no power to state a case for the opinion of the Court under the Summary Jurisdiction Acts.

CASE stated by justices for the city of Liverpool on an application by the appellant for a cinematograph licence.

On January 5, 1910, the council of the county borough of Liverpool delegated to the justices for the city of Liverpool, sitting in petty sessions, all their powers under the Cinematograph Act, 1909 (1), such delegation being in pursuance of s. 5

(1) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 1, prohibits cinematograph exhibitions, where inflammable films are used, unless

1913

HUISH v. LIVERPOOL JUSTICES.

of the Act. Since such delegation the justices have administered the Act in Liverpool.

On April 24, 1913, the justices, acting under the said delegation, held a petty session for the purpose of hearing applications for licences under the Act, and an application for a cinematograph licence was then made by the appellant in respect of certain premises in Liverpool. The justices granted a licence to the appellant and made it subject to certain conditions adopted by them as being reasonably necessary to ensure that in the appellant's premises the entertainments should be in all respects suitable and proper, and in no wise contrary to the public interests, and that the premises should be at all times safe and sanitary. The appellant accepted the licence subject to those conditions, but contended that the conditions (which were annexed to the licence) were ultra vires. The justices overruled that contention, whereupon the appellant applied to them to state a case. The justices thereupon stated a case, but at the same time they submitted that they had no power or jurisdiction to do so, as they were not a Court of summary jurisdiction, and were not deciding any question in a judicial manner between parties.

A. Humphrey Williams (*Macmorran, K.C.*, and *C. Doughty* with him), for the appellant.

A. H. Bodkin, for the respondents. There is a preliminary objection to this appeal, namely, that taken by the justices themselves in the special case, that they had no power to state a

---

the regulations of the Secretary of State are complied with, and except in premises licensed in accordance with the Act.

Sect. 2 enables county councils to grant licences on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, they may by the licences determine.

Sect. 5: "Without prejudice to any other powers of delegation, whether to committees of the council or to district councils, a county council may, with or without any restrictions or conditions as they may think fit, delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act."

Sect. 6: "The provisions of this Act shall apply in the case of a county borough as if the borough council were a county council . . . ."

case. Sect. 2 of the Summary Jurisdiction Act, 1857, and s. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879, which enable a Court of summary jurisdiction to state a case, clearly imply that there are parties who have a lis before the Court. In dealing with licensing matters there are not two parties before the Court, and therefore justices in such proceedings are not sitting as a Court of summary jurisdiction as defined by s. 13, sub-s. 11, of the Interpretation Act, 1889, so as to be able to state a case: *Boulter* v. *Kent Justices.* (1) The position of justices to whom a county or borough council has delegated its powers under the Cinematograph Act, 1909, is exactly analogous to that of justices acting in other licensing matters. The fact that the power under the Act is delegated to them "sitting in petty sessions" does not constitute the justices a Court of summary jurisdiction. Any two justices meeting in the same place for the execution of some power vested in them by law constitute a petty session: *Reg.* v. *Rawlins* (2): Burn's Justice of the Peace (30th ed.), vol. v., p. 384. In *Hagmaier* v. *Willesden Overseers* (3) it was held that justices sitting at special petty sessions for the purpose of reviewing the jury lists were not a Court of summary jurisdiction and therefore had no power to state a special case under the Summary Jurisdiction Act, 1879. In *Reg.* v. *Bird* (4) it was held that justices in hearing an application for a licence to deal in game could not state a case for the opinion of the Court.

A. Humphrey Williams, for the appellant. Sect. 5 of the Cinematograph Act, 1909, enables a county council to delegate its powers under the Act to "justices sitting in petty sessions." Justices so sitting constitute a petty sessional Court, and a petty sessional Court is defined in s. 13, sub-s. 12, of the Interpretation Act, 1889, as "a Court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court house."

[SCRUTTON J. That contention appears to be inconsistent with the decision in *Hagmaier* v. *Willesden Overseers* (3), where the justices were sitting in petty sessions.]

(1) [1897] A. C. 556.
(2) (1838) 8 C. & P. 439.
(3) [1904] 2 K. B. 316.
(4) (1898) 62 J. P. 309.

1913

HUISH v. LIVERPOOL JUSTICES.

The justices were not there sitting in petty sessions, but in special petty sessions. In this case the justices were sitting in petty sessions, not in special petty sessions. In *Boulter* v. *Kent Justices* (1) the licensing powers being exercised by the justices were not conferred upon them as a petty sessional Court or while sitting in petty sessions; the powers there were not exercised in a Court at all. That decision, therefore, does not govern the present case. Further, under s. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879, the language of which is wider than that of s. 2 of the Summary Jurisdiction Act, 1857, there need not be two parties before the Court; any person aggrieved may appeal. In *Reg.* v. *Bell, Ex parte Flinn* (2) justices who had refused an application under s. 15 of the Licensing Act, 1874, for an authority to carry on a certain beer-house till the next special sessions for licensing purposes were ordered to state a case setting forth the grounds of their determination. In that case there were not two parties; there was merely one party, namely, the owner of the premises who was the person aggrieved.

A. H. Bodkin in reply. Sect. 15 of the Licensing Act, 1874, upon which *Reg.* v. *Bell, Ex parte Flinn* (2) was decided, required in terms that the application for a protection order should be made to "a Court of summary jurisdiction." Sect. 88 of the Licensing (Consolidation) Act, 1910, contains a similar provision.

RIDLEY J. In this case Mr. Humphrey Williams, who has put his argument as clearly as it could have been put, asks us to say that the justices in hearing the appellant's application for a cinematograph licence had power to state a case under the Summary Jurisdiction Acts for the opinion of this Court. We have come to the conclusion, however, that the justices had no such power.

The question arises in this way: by the Cinematograph Act, 1909, provision is made for securing safety at cinematograph exhibitions. Sect. 1 provides that cinematograph exhibitions, in which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with. By s. 2 a county council may grant

(1) [1897] A. C. 556. (2) (1889) 15 Times L. R. 487.

licences to hold cinematograph exhibitions on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, they may by the respective licences determine. Then by s. 5 a county council may "delegate to justices sitting in petty sessions" any of their powers under the Act; and by s. 6 it is enacted that the provisions of the Act are to apply in the case of a county borough as if the borough council were a county council. In the present case the council of the county borough of Liverpool delegated to the justices the powers conferred on them by the Act. There is no magic in the phrase "justices sitting in petty sessions" which was so much relied upon by Mr. Humphrey Williams. It is not a phrase defined in the Interpretation Act, 1889. Sect. 5 does not say that the powers of the county council may be delegated to "justices in a petty sessional Court"; it simply says that the powers may be delegated to "justices sitting in petty sessions." That phrase properly understood merely means that an applicant for a cinematograph licence need not go to the justices sitting in quarter sessions or to any special tribunal constituted by Act of Parliament which may be held by justices, but that he may get from justices in petty sessions in an informal manner a licence under the Act. Justices may act in petty sessions in Court or out of Court, and where powers are delegated to them "sitting in petty sessions" they may possibly exercise them not in Court and not as a Court but out of Court.

In *Hagmaier* v. *Willesden Overseers* (1) the justices had been sitting in special petty sessions to review the jury lists, and the question raised was whether, when so sitting, they could state a case for the opinion of this Court. Reliance was there placed on the expression "Court of summary jurisdiction" as defined by s. 13, sub-s. 11, of the Interpretation Act, 1889. That sub-section says that the expression "Court of summary jurisdiction" shall mean "any justice or justices of the peace . . . . to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts . . . . and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." It

(1) [1904] 2 K. B. 316.

1913

HUISH v. LIVERPOOL JUSTICES.

Ridley J.

was said that although it was held in *Boulter* v. *Kent Justices* (1) that parties were necessary to the proceedings before the justices in order that there might be a Court of summary jurisdiction yet, by virtue of the definition in the Interpretation Act, 1889, which I have read, the case was taken out of the decision in *Boulter* v. *Kent Justices*. (1) That was the argument in *Hagmaier* v. *Willesden Overseers*. (2) How was it dealt with by the Court? It will be borne in mind that it was assumed throughout that *Boulter* v. *Kent Justices* (1) was binding, but it was argued that the appellant was entitled to have a case stated notwithstanding that decision. Lord Alverstone C.J. dealt with the matter thus (at p. 319): "But in order to bring this case within s. 33 of the Act of 1879, it is necessary that the justices should be acting as a 'Court of summary jurisdiction.' In order to make that out, counsel for the appellant relies on s. 13, sub-s. 11, of the Interpretation Act, 1889, which provides that 'The expression "Court of summary jurisdiction" shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law.' I think that the meaning of that section is that justices are acting as a Court of summary jurisdiction when they are exercising a jurisdiction similar to that conferred by the Summary Jurisdiction Acts, although in fact their jurisdiction in the particular case is derived, not from these Acts, but from some other Act or from the common law. The question we have to consider is whether justices sitting in special petty sessions under s. 10 of the Juries Act, 1825, are a Court of summary jurisdiction within s. 13, sub-s. 11, of the Interpretation Act, 1889." In other words, it depends on the character of the jurisdiction which they are exercising; not on the source from which it has been derived. The Lord Chief Justice then proceeded to shew that justices when so acting were not a Court of summary jurisdiction, and added (at p. 320): "It seems to me that that is a

(1) [1897] A. C. 556. (2) [1904] 2 K. B. 316.

class of jurisdiction which cannot aptly be described as the proceedings of a Court of summary jurisdiction. I think it more nearly resembles the proceedings of a public authority." I quote those words because they shew that the Lord Chief Justice was there proceeding on the same lines as the decision in *Boulter* v. *Kent Justices*. (1) Wills J. used language to the same effect.

In the present case there is less than there was in *Hagmaier* v. *Willesden Overseers* (2) to shew that the justices were sitting as a Court of summary jurisdiction, because in this case the words are merely "justices in petty sessions." But apart from that, it seems to me that *Boulter* v. *Kent Justices* (1) decided that justices sitting in this way dealing with a matter not between parties—a question of licensing, or granting, or refusing power to do a particular thing in the interests of the public—are not acting as a Court of summary jurisdiction. The language of Lord Halsbury and Lord Herschell in *Boulter* v. *Kent Justices* (1) is quite clear and is of general application. Reference was also made in that case to the provisions of the Summary Jurisdiction Act, 1879, and it was pointed out that notice of appeal has to be given by the appellant to the other party to the proceedings. Considerable stress was laid upon that point by Lord Herschell. Certainly the justices in this case cannot be considered as sitting as a Court of summary jurisdiction when it was held that the justices in *Boulter* v. *Kent Justices* (1) were not. The preliminary objection therefore prevails.

SCRUTTON J. I am of the same opinion, but as this case affects a large number of licensing authorities I desire to state my reasons.

The question is whether the licensing authority for cinematograph exhibitions in the county borough of Liverpool has power to state a special case under the Summary Jurisdiction Acts. Mr. Humphrey Williams, who put his point very clearly before the Court, argued in this way: Sect. 33 of the Summary Jurisdiction Act, 1879, provides that any person aggrieved who desires to question a determination of a Court of summary jurisdiction may apply to the Court to state a special case. He then said

(1) [1897] A. C. 556. (2) [1904] 2 K. B. 316.

1913

HUISH v. LIVERPOOL JUSTICES.

Scrutton J.

that in this case the body acting were justices sitting in petty sessions who were authorized to act under the Summary Jurisdiction Acts, although they were in fact acting under another Act, namely, the Cinematograph Act, 1909, from which Mr. Humphrey Williams draws the conclusion that they were a Court of summary jurisdiction and had power to state a case. He admitted that the borough council of Liverpool would have had no power to state a case because they would have been exercising an administrative function, but he said that the body which has no power to state a case can delegate its powers to another body which can state a case. It has been repeatedly held that licensing powers are administrative, as distinguished from judicial, functions, and we have the guidance of the House of Lords in *Boulter* v. *Kent Justices* (1) that licensing justices sitting in licensing sessions under the Licensing Acts are not a Court of summary jurisdiction within the Summary Jurisdiction Act, 1879, as governed by the Interpretation Act, 1889, and have no power to state a case. The particular point in *Boulter* v. *Kent Justices* (1) was whether justices had power to give costs against an objector who had appeared at the licensing meeting but did not appear at quarter sessions. The judgments of Lord Halsbury and Lord Herschell both point out that to decide that the justices had such a power would be to read the definition section in the Interpretation Act, 1889, in too wide a sense. The fact that at some time a body is a Court of summary jurisdiction does not make it always a Court of summary jurisdiction; it must be a body which is exercising a judicial, as distinguished from an administrative, function, and the House of Lords held that the licensing authority for public-houses exercises an administrative function and is not therefore a Court of summary jurisdiction. That decision having been given with regard to licensing was carried two steps further by the decisions in *Reg.* v. *Bird* (2) and *Hagmaier* v. *Willesden Overseers.* (3) The former of those cases had reference to justices acting under the Game Act, 1831, which by s. 18 empowers them to hold a special session yearly in the month of July for the purpose of granting licences to

(1) [1897] A. C. 556. (2) 62 J. P. 309.
(3) [1904] 2 K. B. 316.

persons to deal in game. In that case Wright J. pointed out that administrative bodies for the granting of such licences had no power to state a case, the reason of course being that they are exercising administrative and not judicial functions and are not Courts of summary jurisdiction. The principle was again applied in the second of the two cases to which I referred—*Hagmaier* v. *Willesden Overseers.* (1) Justices have power under the Juries Act, 1825, to hold a special petty session within a particular period for the purpose of reviewing the jury lists, and the question in *Hagmaier* v. *Willesden Overseers* (1) was whether, when so acting, the justices had power to state a special case. It was held that they had no power to do so, because, although sitting in special petty sessions—there is no magic in that expression—it depended upon what they were doing; if they were exercising judicial functions, they were a Court of summary jurisdiction; if they were exercising administrative functions they were not, and had no power to state a case. In that state of the authorities it seems to me that the argument of Mr. Humphrey Williams, that because we find the borough council of Liverpool delegating their powers under the Cinematograph Act, 1909, to justices "sitting in petty sessions" that makes them a Court of summary jurisdiction, must fail. The important matter to consider is what the justices, to whom, sitting in petty sessions, the particular power is delegated, are doing. For these reasons I think the authorities bind us to hold that in the case of this licensing authority, whose powers, when exercised by the borough council, would admittedly have been administrative, and in the case of any licensing authority while exercising administrative functions, there is no power to state a special case. Whether such bodies should have that power is a matter for Parliament and not for this Court.

BAILHACHE J. I am of the same opinion.

Preliminary objection upheld.

Solicitors for appellant: *Alfred Harris & Co.*

Solicitors for respondents: *Collyer-Bristow & Co., for Edgar C. Sanders, Liverpool.*

(1) [1904] 2 K. B. 316.

J. S. H.

1913
Oct. 29.

NICHOLLS *v.* EVANS.

[1913 N. 583.]

Gaming—Cheques given for Racing Bets—Cheques paid by Payee into his Bank—Claim against Payee as "Holder" to recover back Amount of Cheques—Whether Bank an "Indorsee"—Gaming Act, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

Sect. 1 of the Gaming Act, 1835, provides that certain securities, which by previous statutes would have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration.

Sect. 2: "In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is [by certain statutes] declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law . . . . "

The plaintiff, in payment of certain racing bets, gave the defendant five cheques for the amount. The cheques were made payable to the defendant or order and crossed, and were paid by the defendant into his bank. There was no evidence that the defendant's banking account was overdrawn. The plaintiff subsequently sought to recover back the amount of the cheques from the defendant under s. 2 of the Gaming Act, 1835:—

Held, that the action failed inasmuch as (1.) the defendant was not the "holder" of the cheques within s. 2 of the Act of 1835, and (2.) it must be inferred that the bank into which the defendant paid the cheques merely collected the same for the defendant and was therefore not an "indorsee" within the meaning of s. 2.

Whether the plaintiff could have recovered under the section if the defendant had paid the cheques to his bankers in the character of holders in their own right, and not in the character of agents for collection merely, *quære*.

Trial of action by Channell J. without a jury.

The plaintiff sued the defendant to recover the sum of 52*l.* 10*s.*, which he claimed to be due to him. The defendant pleaded the Gaming Act, whereupon the plaintiff amended his

claim and sued under s. 2 of the Gaming Act, 1835 (1), to recover 93*l.* 13*s.* 3*d.*, being the amount of five crossed cheques drawn by the plaintiff in favour of the defendant or order, and indorsed by the defendant and paid into his bank, such cheques having been given in respect of racing bets won by the defendant from the plaintiff.

By his defence the defendant relied on s. 18 of the Gaming Act, 1845.

Haldinstein, K.C., and *Harold Simmons*, for the plaintiff. As the cheques were given in respect of betting transactions, they are by virtue of the Gaming Act, 1835, deemed to have been given for an illegal consideration, and s. 2 of that Act enables the drawer of the cheques to recover the amount represented by them from the "holder." The defendant as payee is the "holder" of the cheques in question: see s. 2 of the Bills of Exchange Act, 1882, which defines "holder" as "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." The fact that in s. 2 of the Act of 1835 the word "holder" is interposed between the words "indorsee" and "assignee" shews that it must have a different meaning from those words. There was no necessity to insert the word "holder" if it meant the same thing as "indorsee." Secondly, the plaintiff is entitled to recover as the cheques were made payable to the defendant or order and crossed and have been

(1) Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 1: ". . . . Every note, bill, or mortgage which if this Act had not been passed would, by virtue of [certain recited Acts] have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration . . . ."

Sect. 2: "In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts . . . . declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's courts of record."

1913

NICHOLLS v. EVANS.

indorsed by the payee to his bank. The bank is therefore an "indorsee" or a holder for value within the meaning of the section.

[CHANNELL J. Is there any evidence that the defendant's account was overdrawn?]

There is no such evidence.

Hemmerde, K.C., and *Rowan Hamilton*, for the defendant, were not called upon.

CHANNELL J. I do not think that there is any real doubt about this case. I start with this, that, as a rule, bets are void, and a security given in respect of a bet is given without consideration; but the Gaming Act, 1835, has introduced a new matter and made such securities not merely void but illegal. If a person makes a bet and, having lost, pays it in cash he cannot recover it back. That, I think, is agreed. If that is the case, it seems somewhat ridiculous that the fact that the bet is paid, not in cash, but by the machinery of a cheque, should make any difference. It seems to me that where the cheque is the mere machinery of payment the position between the parties is exactly the same as if the money had been paid in cash. Suppose the loser paid by a bank note, which is a promissory note and is certainly negotiable, could he recover the amount back when clearly he could not recover if he had paid in sovereigns? Surely not. But it is said that s. 2 of the Gaming Act, 1835, applies to this case, and upon that section the argument has arisen. What does the section mean? It seems to me quite clear that it distinguishes between an indorsee, holder, or assignee on the one hand and the person to whom the bill or note was originally given on the other hand; and the "holder" therefore means a holder who derives his title from the person to whom the bill or note was given—a person with a distinct title from the original payee just as an indorsee or an assignee clearly has a distinct title. If that is the correct reading of the section, as in my view it is, it is in accordance with common sense. If a person gives a cheque, note, or bill for the consideration of a bet, he can refuse to pay it, but if he does pay it to the payee and the matter has thus become a completed transaction

he cannot recover the amount back. If, however, the cheque gets into the hands of an innocent indorsee the drawer can be compelled to pay that indorsee, but as between himself and the payee of the cheque he ought to be in the same position as if the transaction were incomplete. But if, as I have said, the payee has been paid, there is no conceivable reason why the drawer should recover back the amount. Construed in that way there is no difficulty about the section. The only difficulty in this case arises from the fact that the cheques in question were crossed by the plaintiff and made payable to the defendant or his order. Being crossed, the defendant could only get payment of them by paying them into his bank. In point of fact he did that, and if that payment had been to the bankers in the character of holders in their own right, and not in the character of agents for collection merely, there would have been some doubt whether s. 2 did not apply. Possibly, if there was evidence that the defendant's account had been overdrawn, the section might have applied. No such evidence has been given, and from all the circumstances of the case I draw the inference that the bank merely collected the cheques for the payee. That being so, the bank was not an indorsee, holder, or assignee of the cheques within the meaning of s. 2. As the section does not apply, the plaintiff's claim fails.

Judgment for defendant.

Solicitors for plaintiff: *W. Gipps Kent & Son.*
Solicitor for defendant: *H. Percy Crowe.*

J. S. H.

[NOTE.—See *Lynn* v. *Bell* (1), which was not quoted in argument.—REP.]

(1) (1876) 10 Ir. R. C. L. 487.

1913
June 23, 24;
July 31.

In re THE VEXATIOUS ACTIONS ACT, 1896.
In re BERNARD BOALER.

Practice—Vexatious Actions—Order that no Legal Proceedings be instituted without Leave of High Court—Criminal Proceedings—Vexatious Actions Act, 1896 (59 & 60 *Vict. c.* 51), *s.* 1.

By s. 1 of the Vexatious Actions Act, 1896: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, ... the Court may . . . . order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding."

Upon the application of the Attorney-General a Divisional Court made an order under the above section that no legal proceedings should be instituted by B. in the High Court or in any other Court unless he obtained the leave of the High Court or some judge thereof and satisfied the Court or judge that the legal proceeding was not an abuse of the process of the Court and that there was a prima facie ground for the proceeding:—

Held by Darling and Lush JJ. (Bankes J. dissenting), that the words "legal proceedings" in the section do not include criminal proceedings, and that therefore the order of the Divisional Court was no bar to an application to a magistrate for a summons by B. upon an information sworn by him, nor to the presentment of an indictment by B. to a grand jury in respect of certain misdemeanours, without the leave of the High Court or a judge thereof.

Per Lush J. (Bankes J. dissenting): A person who applies upon an information to a magistrate for a summons, or who presents a bill of indictment to a grand jury, does not institute legal proceedings within the meaning of the Act.

MOTION.

On December 17, 1910, a Divisional Court, upon the application of the Attorney-General, made the following order against the applicant Bernard Boaler under s. 1 of the Vexatious Actions Act, 1896: "It is ordered that no legal proceedings shall be instituted by the said Bernard Boaler in the High Court or in any other Court unless he obtains the leave of the High Court or some judge thereof and satisfies the Court or judge that such

legal proceeding is not an abuse of the process of the Court and that there is a prima facie ground for such proceeding."

It appeared from an affidavit made by the applicant that on May 21, 1913, the applicant "gave the clerk of the Central Criminal Court statutory notice in writing that" he "purposed at the next ensuing sessions to be held on May 27, 1913, to present a bill of indictment to the grand jury against John Esson & Son, Limited, in respect of certain misdemeanours committed within the jurisdiction of the Central Criminal Court and over which the Courts of summary jurisdiction had no jurisdiction to hear and determine or to commit for trial."

On Wednesday, May 28, 1913, he was requested by an official in the Indictment Office of the Central Criminal Court to go to the Recorder, Sir Forrest Fulton, sitting in Court. He went, and the Recorder referred to the Vexatious Actions Act, 1896, and expressed the opinion that the order of December 17, 1910, prohibited the applicant from instituting any legal proceedings unless he had obtained the leave of the High Court or some judge thereof to present the bill of indictment to the grand jury; that he could not give the applicant leave because he was not a judge of the High Court; and finally said that the applicant could not institute criminal proceedings without the leave of the High Court or of some judge thereof. The applicant had previously applied to a magistrate for a summons upon an information sworn by him, but the magistrate refused the application without giving any reasons. For the purposes of the motion, however, the Court assumed that the refusal took place upon the ground that the order of December 17, 1910, was a bar to the application.

The applicant having subsequently obtained leave of a Divisional Court served notice of motion upon the Attorney-General, John Esson & Son, Limited, Edward Kennedy Howes, the liquidator thereof, and certain other persons against whom he alleged the commission of certain criminal offences, for an order (inter alia) that the order of December 17, 1910, restraining him from instituting legal proceedings unless he complied with the conditions imposed by it, might be limited to civil legal proceedings, or in the alternative for an order declaring that the power given to the High Court by the Vexatious Actions

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Act, 1896, to forbid the institution of legal proceedings without leave of the Court only applied to civil proceedings and that the Court had no power to abrogate the applicant's common law right as a citizen to prefer a bill of indictment to the grand jury of the Central Criminal Court for felony or misdemeanour.

By s. 1 of the Vexatious Actions Act, 1896, it is provided that: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the *London Gazette*."

The Applicant in person. An order under the Vexatious Actions Act, 1896, does not apply to criminal proceedings.

Sir John Simon, S.-G., and *Branson*, for the respondent the Attorney-General. Sect. 1 of the Vexatious Actions Act, 1896, enables an order to be made with regard to "legal proceedings" in the "High Court or any other Court." In the earlier part of the section the words are "in the High Court or in any inferior Court," but the words "inferior Court" do not in any way restrict the later words "any other Court."

The effect of ss. 16 and 29 of the Supreme Court of Judicature Act, 1873, is that Courts of Assize and the Central Criminal Court are part of the High Court: *Rex* v. *Parke*. (1)

The words in the statute are not "civil proceedings," but "legal proceedings," and there is no reason to suppose that the

(1) [1903] 2 K. B. 432.

Legislature intended to limit the operation of the Act to civil proceedings. "Legal proceedings" or "proceedings" are terms wide enough to include proceedings before a magistrate: *In re Briton Medical and General Association.* (1)

Under s. 13 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), it has been held that the word "proceeding" includes both civil and criminal proceedings: *Richardson* v. *Willis.* (2)

The Summary Jurisdiction Acts frequently use the word "proceedings" to indicate criminal proceedings; and s. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), gives a right of appeal to the High Court by case stated in respect of any "proceeding" of a Court of summary jurisdiction. The Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Part IX., deals with "legal proceedings" for offences under the Act before Courts of summary jurisdiction; the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), frequently uses the expression "proceedings"; and the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), by s. 8, provides that the Act shall not apply to "proceedings pending at the commencement of this Act," and it has been decided that proceedings were pending as soon as the accused had been charged before a magistrate: *Rex* v. *O'Connor.* (3) In *Thorpe* v. *Priestnall* (4) it was held that a prosecution under the Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), was instituted when an information was laid. A private prosecutor puts the law in motion by instituting criminal proceedings, and for that reason the action for malicious prosecution is brought against him. In the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), a clear distinction is drawn between a public and private prosecution. No doubt the conditions in the order made against the applicant are anomalous, but he is an anomalous citizen. The word "action" is wide enough to include criminal proceedings. In Comyns' Digest, 5th ed., vol. i., p. 220, it is said that "there are two kinds of actions, placita coronæ, et civilia," and in Bacon's Abridgment, 7th ed., vol. i., p. 53, that "actions are divided into criminal and civil." In Order LXVIII., r. 1, of the Rules of the Supreme Court, 1883,

(1) (1886) 32 Ch. D. 503.
(2) (1873) L. R. 8 Ex. 69.
(3) [1913] 1 K. B. 557.
(4) [1897] 1 Q. B. 159.

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.*

BOALER, *In re.*

criminal proceedings are included in the expression "causes or matters." There is a distinction between the short title and the full title of a statute. It is true that the short title "The Vexatious Actions Act, 1896," is more applicable to civil than criminal proceedings, but a short title is not conclusive nor indeed relevant except where the statute is ambiguous. It is a mere label and cannot cut down the enacting part of the statute. In the present case the full title "An Act to prevent Abuse of the Process of the High Court or other Courts by the Institution of Vexatious Legal Proceedings" can be aptly used to cover criminal proceedings. It would be very harassing if a person who has habitually instituted vexatious proceedings were to be free to make any number of ex parte applications for process until he is at last successful. The probable result would be that the defendant or respondent to the proceedings launched in consequence of the successful application would be put to great expense.

Arthur Sims, for the respondents John Esson & Son, Limited, and E. K. Howes.

The Applicant in reply. In s. 100 of the Supreme Court of Judicature Act, 1873, an "action" is not to include a criminal proceeding by the Crown and it is defined as "a civil proceeding commenced by writ." It is contrasted with the word "cause," which by the definition includes "any action . . . . and any criminal proceeding by the Crown." The same distinction is drawn in s. 47 of the Act of 1873: *Ex parte Schofield.* (1) The expression used in that section is "any criminal cause or matter." It is therefore clear that the word "action" does not apply to criminal proceedings. The effect of the argument for the Attorney-General if upheld would be that if I were robbed of my watch I should before I could prosecute the thief have to satisfy the Divisional Court that I had had my watch stolen and then satisfy the magistrate. It cannot have been the intention of the Legislature that prosecutions should be hampered in that manner. [*Saull* v. *Browne* (2); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. 2 (*c*);

(1) [1891] 2 Q. B. 428. (2) (1874) L. R. 10 Ch. 64.

and the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 15, were also referred to.]

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Cur. adv. vult.

July 31. DARLING J. read the following judgment:—I have had the advantage of reading the distinct and conflicting judgments prepared by my brothers Bankes and Lush, and, as to refusing the order asked for, though hardly with all his reasoning and conclusions, I concur with the view taken by my brother Lush, but not without serious doubt and some regret. In my opinion the words of the statute are not so restricted as to exclude criminal proceedings from the operation of the order obtained by the Attorney-General, neither are they so large as necessarily or plainly to include them. The statute is a grave limitation on the ancient rights of the subject, yet no word is used in it which discloses a definite intention to deprive a man of his right merely to lay before a grand jury or a magistrate a complaint that he has been the victim of a crime committed, e.g., assault or robbery. Even as regards the civil proceedings which Mr. Boaler is forbidden to institute, I doubt whether the order precludes him from going to the Writ Office of the High Court and simply asking for a writ, although he is disentitled to receive one. So, like Glendower, he may "call spirits from the vasty deep"; and none the less because assuredly they will not come to his calling. Should he demand a writ of summons he should receive nothing with which to institute proceedings unless he produce the enabling order of a judge of the High Court. If it be said then he may, without the judge's order, apply for a rule nisi, I would answer that he may certainly rise and address the Court, but that immediately on its appearing that he is applying to institute proceedings, and that he has not the statutory permission, he should be told that he must not be heard, since it were futile to give time for hearing a request which must of necessity be refused.

The following judgment was read by

BANKES J. On December 17, 1910, an order was made by the Divisional Court upon the application of the Attorney-General

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Bankes J.

directing that no legal proceedings should be instituted by Bernard Boaler in the High Court or in any other Court unless he obtained the leave of the High Court or some judge thereof, and satisfied the Court or judge that such legal proceedings were not an abuse of the process of the Court, and that there was prima facie ground for such proceedings.

The present motion is made at the suggestion of a Divisional Court consisting of Lush J. and myself to give Mr. Boaler an opportunity of obtaining a decision of the Court upon the question whether and how far the above order applies to criminal proceedings. The Act under which the order was made is 59 & 60 Vict. c. 51, intituled "An Act to prevent Abuse of the Process of the High Court or other Courts by the Institution of Vexatious Legal Proceedings." The short title of the Act is the Vexatious Actions Act, 1896. The operative section, i.e., s. 1, provides: [The learned judge having read the section continued:] No assistance can, I think, be obtained in construing the language of this section by a reference to the short title of the Act. It remains then to consider the meaning of the words "legal proceedings" and the "institution of legal proceedings in the High Court or any other Court." It is, I think, clear that the language used with regard to the Court in which proceedings are not to be instituted is wide enough to include and must include every Court in the kingdom, whether it exercises both a civil and a criminal jurisdiction, or a civil jurisdiction only, or a criminal jurisdiction only. What then is meant by the expression "legal proceedings" in any such Court? Here again the widest possible expression is used, and I am unable to find anything in the Act which would justify me in putting any limitation upon its meaning. We were referred by the Solicitor-General to a number of cases and statutes in which the expression is used to include all kinds of proceedings, and in my opinion the expression "legal proceedings" in the High Court or in any other Court must include every kind of proceeding within the jurisdiction of these Courts whether it be civil or criminal in its nature.

The only remaining point therefore is as to what constitutes the institution of legal proceedings within the meaning of

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Bankes J.

this Act. This is the only point which in my opinion presents any difficulty. The two occasions upon which Mr. Boaler has attempted to take criminal proceedings were once when he attempted to prefer a bill of indictment before the grand jury at the Central Criminal Court, and once when he applied to the magistrate to grant him a summons upon an information sworn by him. On each occasion he was told that the order which had been made against him was a bar to his proceeding. Those two instances illustrate the difficulty which arises in putting a construction upon the words which I am at present considering. There are certain legal proceedings which require some preliminary application to the Court before they can be effectively launched. As instances I may refer to the application for a rule nisi where such application is necessary, or the application to the magistrate to grant a summons. Both applications may in a sense be said to be attempts to institute legal proceedings, and the question consequently arises whether the statute applies to such attempts or only to cases where the individual can without any preliminary leave whatever start the proceedings which he wishes to take. It has been decided that where after the necessary preliminary application process has been granted and the proceeding has gone on, the proceeding is to be regarded as having been instituted or commenced, as the case may be, when the preliminary application was made: see *Thorpe* v. *Priestnall* (1) and *Rex* v. *O'Connor.* (2) The same has been held where process has been refused: see *Beardsley* v. *Giddings* (3) and *Brooks* v. *Bagshaw.* (4) *Reg.* v. *Yates* (5) was a case where a question very similar to the one which we have to decide was much discussed. The statute which had to be construed in that case was the Newspaper Libel and Registration Act, 1881, s. 3, which provided that no criminal prosecution should be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions in England or His

(1) [1897] 1 Q. B. 159.
(2) [1913] 1 K. B. 557.
(3) [1904] 1 K. B. 847.
(4) [1904] 2 K. B. 798.
(5) (1883) 11 Q. B. D. 750; (1885) 14 Q. B. D. 648.

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Bankes J.

Majesty's Attorney-General in Ireland being first had and obtained. The actual question for decision in the case was whether a criminal information for libel came within the expression "criminal prosecution" in the statute. That point is not material in the present case, but in the course of their judgments both in the Divisional Court and in the Court of Appeal nearly all the judges dealt with the question as to when a criminal prosecution would in their opinion commence and as to the object for which that statute was passed. The object of that statute was in a limited sense the same as the object of the statute which we have to construe, namely, to prevent vexatious proceedings; and in the Divisional Court Mathew J. at p. 753 and Hawkins J. at p. 759, and in the Court of Appeal Brett M.R. at p. 656 of the report in the *Law Reports*, expressly say that in their opinion the application to the magistrate for a summons or the presentation of a bill to the grand jury without notice to the defendant was a kind of vexatious proceeding which that Act was passed to prevent; and in the Divisional Court Hawkins J. at p. 757, Field J. at p. 765, and Lord Coleridge C.J. at p. 776, and in the Court of Appeal Brett M.R. at p. 658, express the opinion that a criminal prosecution is commenced at (to use the language of Field J. at p. 764) the very institution of the preliminary investigation, that is to say, the application to the magistrate for a summons or the presentation of the bill to a grand jury, or the application for a rule nisi where that proceeding is necessary. It is true that Cotton L.J. expresses a contrary view, and so apparently does Brett M.R. at p. 657, though this expression of opinion seems inconsistent with other parts of his judgment. The views above expressed in *Reg.* v. *Yates* (1) are dicta only, but they amount to a very considerable body of judicial opinion that the object of enacting s. 3 of the Newspaper Libel and Registration Act, 1881, was to prevent the vexatious criminal proceeding of either preferring a bill of indictment or of laying an information before a magistrate, and that in order to prevent it the Legislature provided that no criminal prosecution should be commenced without the leave indicated in the section.

In my opinion the preferring of an indictment or the laying

(1) 11 Q. B. D. 750; 14 Q. B. D. 648.

of an information is within the mischief contemplated by the Vexatious Actions Act, 1896. I can draw no distinction between the word "institute" and the word "commence" as applied to legal proceedings except possibly that "institute" is for the present purpose the stronger word of the two. I find a strong body of authority and judicial opinion to the effect that the preferring of a bill of indictment or the laying of an information before a magistrate is the commencement or the institution of a criminal proceeding, and I find nothing in the language or the object of this Act which leads me to the conclusion that I ought to endeavour to put any different construction upon the expression "institute" as used in this Act. On the contrary, I think that to adopt any other construction would lead to unreasonable results. For instance, if in the case of an indictment the finding of the true bill, or in the case of proceedings before a magistrate the granting of the summons, is not the institution of the proceeding, the statute would require the prosecution to apply for the leave of the Court after this step had been successfully taken, and when possibly a considerable part of the mischief intended to be provided against by the statute had been done. In my judgment, in the two instances of criminal proceedings which Mr. Boaler has attempted to take he was instituting legal proceedings within the meaning of the statute and was properly stopped. My judgment must be limited to the two instances to which I have referred, and, so limited, it carries out what was in my opinion the intention of Parliament as expressed in the language of the statute, namely, to stop in limine a very special class of individual, namely, the person who has been proved to the satisfaction of the Court at the instance of the Attorney-General, and after being given the fullest opportunity of being heard, to have habitually and persistently instituted vexatious legal proceedings.

The following judgment was read by

LUSH J. The question we have to decide in this case is whether an order made under the Vexatious Actions Act, 1896, restraining Mr. Boaler from instituting legal proceedings in the High Court or any other Court unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Lush J.

proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding, applies to criminal proceedings. He has recently preferred a bill before a grand jury against a company which he says has committed a criminal offence, and the Recorder, being of opinion that in preferring it he had "instituted" a "legal proceeding" which required the leave of the Court or a judge, has refused to allow the bill to go before the grand jury. On a previous occasion he applied on a sworn information to a magistrate for process against a company or an individual and it was held that that also was a proceeding which he could not institute without leave. He has applied to the Divisional Court to have it declared that criminal proceedings such as these are not within the scope of the Act or the order, and that in taking these steps he has not instituted legal proceedings within the meaning of the Act. In form his application is to discharge the order or to limit it by confining it to civil proceedings. We have to say what is the real scope of the Act and to what proceedings it applies.

Now there can be no doubt that the words "legal proceedings" may refer to criminal as well as civil proceedings if the context indicates that such was the intention. I do not see that the case which the Solicitor-General cited, *In re Briton Medical and General Association* (1), shews more than this. The question there was whether s. 85 of the Companies Act, 1862, which enables the Court to "restrain further proceedings in any action, suit or proceeding against the company," applies to quasi-criminal proceedings for the recovery of penalties. Kay J. held that it did, and the reason given was that as criminal proceedings were mentioned in an earlier section it was reasonable to suppose that the word "proceedings" in that section referred to proceedings of the same nature. But the question that we have to consider is whether the words are used in that sense in this Act. I have come to the conclusion that they are not. I think that the Act refers to civil proceedings only, and I think that on two grounds. The first is that the language of the Act is such as to indicate proceedings which can effectively be taken by a litigant of his own motion, or process which can be used by him without the leave of any Court. The

(1) 32 Ch. D. 503.

expression "abuse of the process of the Court," which occurs both in the title of the Act and the Act itself, imports this. A person can only "abuse" the process if he can "use" it—use it that is so that the process of the Court harasses some other person by exposing him to a vexatious and unfounded claim. "To use the process" of the Court must mean, I think, to put a claim or complaint in train for inquiry and investigation. A party to a civil proceeding can do this. No leave is required (apart from this Act). When a writ or other form of citation is issued and served the party served must take steps to defend himself and the investigation takes place in due course. No prosecutor on the other hand can by his own initiative use the criminal process. It is the Court that permits it to be used, and it permits it only when it is satisfied that the proposed proceedings will not be vexatious and unreasonable. The process cannot be abused for the very good reason that it cannot be used by the complainant of his own will. Even in the cases coming within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), the "prosecutor" must, unless the magistrate has committed, either obtain leave to prefer a bill or satisfy a magistrate that a criminal offence is disclosed, since it is a condition precedent that recognizances are entered into, and if no offence is disclosed a magistrate is not bound to and would not take the recognizances: see *Ex parte Wason*. (1) I do not think that it is possible to apply the provisions of the Act to proceedings which the Court orders to be instituted without doing violence to the language used and without ignoring the fact that it is only in enforcing civil remedies that the process of the Court is open to all who wish to use it. If it is necessary to confirm this view, the short statutory title, which I think the Court is free to look at, confirms it. There is a Vexatious Indictments Act and there is a Vexatious Actions Act, and the scope and function of the two statutes are separate and distinct. The conclusion I have come to stated shortly is this, that the Act was intended to shift the burden in the case of a persistent and unreasonable litigant from the defendant to the plaintiff and to put the onus of

(1) (1869) L. R. 4 Q. B. 573.

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Lush J.

shewing that the proceedings will not be vexatious on to him and to relieve the defendant from the onus of proving that they are.

My other reason for coming to this conclusion is this: I do not think that a person who applies on an information for process can properly be said to be "instituting" or "commencing" proceedings. He is asking the Court to allow them to be instituted, but he is not instituting them. A would-be litigant who applies for leave to issue a writ for service out of the jurisdiction is not commencing an action when he makes the application. A litigant who applies for leave to appeal is not commencing an appeal. If the leave is refused there is no action in the one case and no appeal in the other. This certainly appears to me to have been the view of Brett M.R. and Cotton L.J. in *Reg.* v. *Yates*. (1) The Solicitor-General referred us to *Thorpe* v. *Priestnall*. (2) At first sight it does seem to shew that to apply for process is to commence proceedings, but when the case is carefully considered I do not think that the decision affects this case. What was held there was this: that the Sunday Observance Prosecution Act, 1871, which requires that the consent in writing of the chief officer of police must be obtained before a prosecution can be instituted for breach of the Sunday Observance Act, 1676, means that the leave must be obtained before the information is laid. The circumstances of that case are somewhat special, and any other conclusion might, it seems to me, have led to an inconvenient result. The function of the chief of police in such a case as that is to consider whether the proposed prosecution would be in the public interest. It is not, as the function of the Court or the judge would be under the Vexatious Actions Act, 1896, to consider whether a prima facie case is made out. That would be for the magistrate. Now if the consent were not obtained until after the application for a summons was made, process might be granted on the application, and the prosecution would have been literally "commenced," whereas the leave must be obtained before it is commenced. One can well understand that for the purpose of that Act the laying of the information is the commencement of the prosecution. But it is not true

(1) 11 Q. B. D. 750; 14 Q. B. D. 648. (2) [1897] 1 Q. B. 159.

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Lush J.

to say in every case that the laying of the information or the application for a summons is the commencement of the prosecution, and Wills J. in his judgment in *Thorpe* v. *Priestnall* (1) pointed out that if process is refused no prosecution ever has commenced; there is nothing to which those words are applicable. It cannot, therefore, be predicated generally of such an application that it is the institution or commencement of proceedings. I am aware that this reasoning may be said to point to the conclusion that Mr. Boaler may, notwithstanding the order, apply for leave to issue a writ for service out of the jurisdiction or for a rule nisi without leave, because he would not be instituting legal proceedings. It is not necessary to decide if this is so. Different considerations would, I think, apply in such cases as those. Even if it were so it would affect the form rather than the substance of the application, as the Court to which the application for leave was made could no doubt make the order asked for without requiring the same arguments to be addressed to it over again after leave had been granted. With regard to what was said by the Solicitor-General as to the proposed respondents or defendants being harassed, even if ex parte applications were made without leave, it seems to me that it is no more harassing than to apply on the same materials for leave to apply for an order or for process under the Act.

I would point out, in concluding my judgment, that there are certain consequences which follow from holding that the Act applies to all proceedings which are in my opinion unreasonable. I think that it is unreasonable to say that first a judge and then a magistrate must determine whether the proposed prosecution will be an abuse of the process of the Court, or whether there is prima facie ground for such proceeding, the opinion of the Court or judge not being in any way binding on the magistrate. I think it is unreasonable to stretch an Act which was passed to protect defendants against a well known abuse (see *In re Chaffers* (2)) and which can work no injustice as it leaves the proposed litigant a full and adequate remedy, and make it include a case in which a serious criminal offence may actually have been committed and in which, in

(1) [1897] 1 Q. B. 159. (2) (1897) 76 L. T. 351.

1913

VEXATIOUS ACTIONS ACT, 1896, *In re.* BOALER, *In re.*

Lush J.

consequence of the Act, a grave injustice may result and a crime may go unpunished. This I think clearly might be the result if the person restrained has to prepare affidavits and go, it may be, from a distant county to London, and apply to the High Court for leave to apply to a magistrate for a warrant. One would also, I think, have expected to find some provision with regard to appeals. As the matter stands, a decision of the judge would be final in the case of criminal proceedings and not final in the case of civil proceedings, although the subject-matter in both cases is the same, namely, the determination whether the proposed proceeding is an abuse of the process of the Court. At all events, I think that we ought not to hold that the Act, or an order under the Act, deprives a subject of the constitutional right which he has to apply for protection to the Court exercising criminal jurisdiction, or to present a bill before a grand jury, unless the Legislature has so declared in clear and unequivocal terms.

In my opinion, therefore, Mr. Boaler is entitled to have the order limited so as to exclude criminal proceedings.

Order accordingly. (1)

Solicitor for respondent the Attorney-General: *Treasury Solicitor.*

Solicitors for respondents John Esson & Son, Limited, and Howes: *Steadman, Van Praagh and Gaylor.*

(1) The following is the form (omitting formal parts) in which the order was drawn up: "This Court doth declare that criminal offences are not within the meaning of the words 'legal proceedings' mentioned in the Vexatious Actions Act, 1896."

J. E. A.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ALFRED CHAINEY.

1913
Nov. 3.

Criminal Law—Girl under Age of Sixteen Years—Unlawful Carnal Knowledge—Causing or encouraging—Knowingly allowing—Children Act, 1908, (8 *Edw.* 7, *c.* 67), *s.* 17—*Children Act* (1908) *Amendment Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 25), *s.* 1.

By s. 17, sub-s. 1, of the Children Act, 1908, as amended by s. 1 of the Children Act (1908) Amendment Act, 1910, if any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the unlawful carnal knowledge of that girl he is guilty of a misdemeanour.

By s. 17, sub-s. 2, of the Act of 1908 as amended by s. 1 of the Act of 1910, a person shall be deemed to have caused or encouraged the unlawful carnal knowledge of a girl who has been unlawfully carnally known if he has knowingly allowed the girl to consort with any prostitute or person of known immoral character.

The appellant was charged under the above enactments with causing or encouraging the unlawful carnal knowledge of his daughter, a girl under the age of sixteen years. He was an engine driver and was obliged to be away from home at night for a fortnight in every four weeks. He was the father of three girls, the youngest being under the age of sixteen years. His wife, the stepmother of the girls, was addicted to drunkenness. When he was on duty by day the girls were at home by half-past 9 at night. When he was on duty at night the girls were allowed to be out later and to consort with persons of known immoral character. The appellant and his wife were repeatedly warned to exercise more control over the girls. The eldest girl was seduced and after being removed to a home where she was delivered of a child she returned with her child to her father's house. On one occasion the appellant, seeing the youngest girl passing the door at half-past 9 o'clock at night talking to a man, had ordered her indoors and reproved her. On other occasions he had remonstrated with her and threatened to send her to a home if she did not behave herself properly. There was no evidence that he knew she was having immoral intercourse with men. The youngest girl having been seduced, the present proceedings were commenced:—

Held, that there was no evidence fit to be left to the jury that the appellant had knowingly allowed the girl to consort with persons of known immoral character within the meaning of s. 17, sub-s. 2, of the Act of 1908.

Appeal from conviction.

Alfred Chainey, the appellant, and Rose Chainey, his wife, were convicted at the Salisbury city sessions of unlawfully

1913

REX v. CHAINEY.

causing or encouraging the carnal knowledge of Louisa Linda Violet Chainey, a girl under the age of sixteen years, against the form of the statute in such case made and provided, namely, the Children Act, 1908 (8 Edw. 7, c. 67), s. 17, sub-s. 1, as amended by the Children Act (1908) Amendment Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 25), s. 1. (1)

Alfred Chainey was the father of three daughters, Edith Priscilla Maud, called Maud, who was about nineteen years old, Elizabeth Catherine, about seventeen years old, and Louisa Linda Violet, called Lily, who was born on June 5, 1898, and was about fifteen years old. Their mother had been dead about nine years. The defendant Rose Chainey, the stepmother of the girls, was much addicted to drunkenness.

Alfred Chainey was an engine driver. His work demanded his absence from home at night during one fortnight in every four weeks. When he was on duty by day the girls were usually at home by half-past 9 at night. When he was on duty at night the girls were allowed to be out later and to consort with persons of known immoral character. In February, 1912, the girl Maud was seduced and became pregnant. In April, 1912, the Lady Superintendent of the Salisbury Diocesan Refuge endeavoured to have the girl sent to a home, but Alfred Chainey would not give his consent. In September his consent was obtained, and on September 10 the girl was taken to a

(1) Children Act, 1908 (8 Edw. 7, c. 67), s. 17: "(1.) If any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanour and shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years.

"(2.) For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution (as the case may be) of a girl who has been seduced or become a prostitute if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character."

Children Act (1908) Amendment Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 25), s. 1: "Sub-sections (1.) and (2.) of section 17 of the Children Act, 1908, shall be read as if in each of these sub-sections the words 'or unlawful carnal knowledge' were inserted after the words 'seduction or prostitution,' and as if the words 'or been unlawfully carnally known' were inserted after the words 'become a prostitute,' . . . ."

1913

REX v. CHAINEY.

maternity home, where on October 26 she was delivered of a child. In February, 1913, she returned with the child to her father's house.

Fearing that the girl Lily would get into trouble from associating with bad companions, the Lady Superintendent made an effort to have her removed, but desisted owing to the difficulty she had met with in the case of the girl Maud and also on account of expense. In January or February, 1913, the girl Lily was seduced and became pregnant. In August, 1913, she was removed to a home where she was awaiting her confinement at the date of the trial.

The two defendants were repeatedly warned to exercise more control over the girls. On one occasion in June, 1913, Alfred Chainey had seen the girl Lily passing the door of his house talking to a soldier at about half-past 9 at night. He ordered her indoors and reproved her for her conduct. On other occasions he had remonstrated with the girl and had told her that if she did not behave herself properly she would be sent to a home. There was no evidence that he knew that the girl was having immoral intercourse with men.

The jury found Alfred Chainey guilty of negligence with a recommendation to mercy and Rose Chainey guilty of criminal negligence on all counts. Counsel for Alfred Chainey claimed that this was a verdict of not guilty. The transcript of the shorthand notes taken at the trial contains the following account of what then occurred:—

"*The Recorder* (to the jury): Tell me whether you find this:—Do you find that the man had the care of this child and caused or encouraged unlawful carnal knowledge? I don't think you ought to say simply 'neglect.'

"The jury having again consulted in private—

"*The Recorder:* Are you now agreed upon your verdict? What do you say about the male prisoner?

"*The Foreman:* Guilty of criminal neglect with a strong recommendation to mercy.

"*The Recorder:* Do you mean to say having the custody of this daughter he by his neglect caused her unlawful carnal knowledge?

1913

REX v. CHAINEY.

"*The Foreman:* Yes.

"*The Recorder:* It is quite clear that is what you mean?

"*The Foreman:* Yes."

Alfred Chainey was then sentenced to imprisonment with hard labour for a term of three months and Rose Chainey to imprisonment with hard labour for a term of eight months.

Alfred Chainey appealed.

J. E. Y. Radcliffe, for the appellant, stated the facts, when the Court called on

T. H. Parr, for the prosecution. There was ample evidence on which the jury could find that the appellant was guilty of the offence of "causing or encouraging" the unlawful carnal knowledge of the girl Lily. It is plain that those words mean something short of taking some active step towards bringing about the seduction or unlawful carnal knowledge of the girl, because for active steps taken a person would be guilty of aiding and abetting; the law as it stood before the Act of 1908 was sufficient to deal with that offence and the Act of 1908 was unnecessary. The object of that Act was to awaken a sense of responsibility for the moral welfare of young girls in those who have the care or custody of them. Therefore s. 17, sub-s. 2, enacts that a person shall be deemed to have caused or encouraged the seduction of the girl if he knowingly allows her to consort with persons of known immoral character. If the person who has charge of the girl knows that she is keeping bad company, then mere acquiescence or inactivity will not exculpate him. He must take active steps for her protection. This default was intended to be conveyed by the words "negligence" and "criminal neglect" in the summing up and in the verdict of the jury.

[ISAACS C.J. What steps could this man have taken?]

He could have gone before a petty sessional court under s. 59 of the Act of 1908 and have applied for an order committing the girl to the care of some relative or other fit person. The evidence shews that the Lady Superintendent of the Salisbury Diocesan Refuge was ready and willing to take the girl to a home but was discouraged by the former refusal by the appellant of her services in

the case of his eldest daughter. He certainly ought to have applied to this lady in the case of the youngest girl. Or he might have made an effort to induce some respectable woman to exercise the restraining influence which his wife ought to have exerted and failed to exert over the girl. There is no evidence that he took any step whatever beyond an ineffectual remonstrance, which shews that he knew the girl was keeping undesirable company. After what had happened to the eldest girl and after the warnings he had received he must have known that the girl Lily was consorting with persons of known immoral character. He allowed this by taking no steps to prevent it; therefore he is to be deemed to have caused or encouraged her unlawful carnal knowledge, and was rightly convicted.

Radcliffe, for the appellant, was not heard in reply.

The judgment of the COURT (Isaacs C.J. and Darling and Atkin JJ.) was delivered by

ISAACS C.J. This is an appeal by Alfred Chainey, who was charged with his wife on an indictment under s. 17 of the Children Act, 1908, as amended by s. 1 of the Children Act, (1908) Amendment Act, 1910, with the offence of causing or encouraging the seduction, prostitution, or unlawful carnal knowledge of his daughter, a girl under the age of sixteen years. At the trial the jury found the wife guilty, and she was sentenced to eight months' imprisonment with hard labour. From that sentence she has not appealed. The jury found a verdict discriminating at first between the appellant and his wife. In the end the verdict was taken as one of guilty against the appellant, and he was sentenced to three months' imprisonment with hard labour. The case is one of some importance having regard to the wording of the enactments in question. The Children Act, 1908, by s. 17, sub-s. 1, provides that "if any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution"—and s. 1 of the Act of 1910 adds "or the unlawful carnal knowledge"—"of that girl, he shall be guilty of a misdemeanour." If there was no further provision in these Acts it might have been argued that a man who took no active step could not be

1913

REX v. CHAINEY.

guilty of "causing" or "encouraging" within the meaning of s. 17, sub-s. 1. I doubt myself whether such an argument would have prevailed in all cases; but, however that may be, the Legislature by s. 17, sub-s. 2, enacted that a person should be deemed to have caused or encouraged the seduction or prostitution—or by s. 1 of the Act of 1910 the unlawful carnal knowledge—of the girl, "if he has knowingly allowed the girl to consort with . . . . any prostitute or person of known immoral character." This sub-section, however, has not altered the offence which is still the offence of "causing or encouraging" the seduction, prostitution, or unlawful carnal knowledge of the girl. It is true that the offence may be proved without shewing that the defendant took any active step to bring about the seduction, prostitution, or unlawful carnal knowledge; it may be proved by shewing that he knowingly allowed the girl to consort with persons of known immoral character. If it was proved that a father, knowing that his daughter was consorting with persons of known immoral character, stood by and allowed such intimacies to continue when it was in his power to prevent them, that might furnish evidence of causing or encouraging her unlawful carnal knowledge. But there is a wide difference between allowing and "knowingly allowing" within the meaning of this enactment. There are many cases upon the meaning of "allowing," "permitting," or "suffering" in other statutes, but they do not give much assistance in this case, because it is clear that the "knowingly allowing" which is contemplated in s. 17, sub-s. 2, of the Act of 1908 must be such a permission as can be deemed to be causing or encouraging. That which might not be held to be causing or encouraging within sub-s. 1 is to be deemed to be causing or encouraging by sub-s. 2. Can the appellant be said to have caused or encouraged the event which happened in this case? It is necessary to look at the facts. For many years he had been an engine driver. His work necessarily took him away at nights. He had the misfortune to marry a woman of drunken habits who seems to have taken no steps to protect the chastity or encourage the morality of her stepdaughters. On one occasion when he was at home at night and found his daughter talking to a soldier he called her in and rebuked her; there is

no reason to suppose that anything was happening beyond the fact that the girl was talking to the man. It was said that although truly the stepmother was the person primarily responsible for the care of this girl, yet the father was properly convicted, not because he did nothing but because he omitted to do something; that by omitting to take certain steps he was knowingly allowing the girl to consort with persons of known immoral character although it is not proved that he knew she was so consorting. Counsel for the prosecution was asked what steps he could suggest as practicable in the circumstances. He suggested that the appellant might have brought the girl before a petty sessional court under s. 59 of the Act of 1908 and might have applied for an order that she should be committed to the care of some relative or other fit person. This suggestion was not made at the trial and was not pressed before this Court; and rightly, because the omission to take such a step could not be held to be causing or encouraging the mischief which happened. Then it was said that the appellant ought to have accepted the offer made by the Lady Superintendent of the Salisbury Diocesan Refuge; but that offer was not made to the appellant. The third suggestion was that he might have got some respectable woman to look after the child. In considering these suggestions one must take into account the conditions of the home in which the parties lived. In this view the last suggestion has only to be stated to be rejected. In the circumstances of life in which these persons were placed we are of opinion that there was no evidence fit to be left to the jury, and certainly not sufficient to convict the appellant, of any offence under s. 17.

Moreover we are not satisfied that the jury ever found a verdict on which the appellant could be convicted of the offence with which he was charged. They found the appellant guilty of negligence with a recommendation to mercy; they found his wife guilty of criminal negligence on all counts. Negligence is not an offence under the enactment in question. The offence is causing or encouraging, and the evidence must at least amount to knowingly allowing. To allow knowingly would seem to include negligence, but negligence does not necessarily amount to conscious permission. The use of the word "negligence"

1913

REX v. CHAINEY.

or "neglect" as a substitute for the actual words of the enactment has probably introduced an element of confusion into the case with the result that the jury have returned a verdict which will not support a conviction. The result is that the appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitors for prosecution: *Church, Rackham & Co.*

W. H. G.

1913
Nov. 11.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* LOWDEN.

Criminal Law—Sale of Forged Stamps—Stamps cancelled before Sale—Stamp Duties Management Act, 1891 (54 & 55 *Vict. c.* 38), *s.* 13.

Sect. 13 of the Stamp Duties Management Act, 1891, enacts that a person who "knowingly sells or exposes for sale or utters or uses any forged stamp" shall be guilty of felony:—

Held, that a person who sells a forged stamp commits an offence against s. 13, notwithstanding that the stamp when sold bears a cancellation mark.

APPEAL from a conviction before the Common Serjeant at the Central Criminal Court.

The appellant was indicted under s. 13 of the Stamp Duties Management Act, 1891. (1) The first count of the indictment charged the appellant with having feloniously and knowingly sold

(1) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 13: "Every person who does, or causes or procures to be done, or knowingly aids, abets, or assists in doing, any of the acts following; that is to say

. . . . . .

"(8.) knowingly sells or exposes for sale or utters or uses any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die;

"(9.) knowingly, and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any forged die or stamp . . . .

shall be guilty of felony . . . ."

1913

REX v. LOWDEN.

2679 forged stamps purporting to be genuine postage stamps of Great Britain of the denomination of 1*l.* each; the second count charged him with exposing the forged stamps for sale; the third count charged him with uttering the forged stamps; and the fourth count charged him with knowingly and without lawful excuse having in his possession the forged stamps. The stamps in question were forged 1*l.* stamps with a forged obliteration, but there was no evidence that the stamps and cancellations were not forged before they came into the appellant's possession.

Eustace Fulton, for the appellant. The conviction was wrong inasmuch as what the appellant sold or had in his possession were not "stamps" within the meaning of that expression in s. 13 of the Stamp Duties Management Act, 1891. The provisions of that Act are for the protection of the revenue, and from a consideration of the various sections it is obvious that the word "stamps" is used solely as meaning unused stamps. Thus, s. 3 enables the Commissioners to grant licences to deal in stamps; s. 4 imposes a penalty on dealing in stamps by a person not duly appointed to sell and distribute them; s. 9 deals with the subject of allowance for spoiled stamps; and s. 12 enables the Commissioners to repurchase stamps under a discount. Obviously all these provisions relate solely to unused stamps, and there is nothing in s. 13 to lead the Court to suppose that the word "stamps" there used has a different meaning.

A. H. Bodkin and *Roland Oliver*, for the Crown, were not called upon.

The judgment of the COURT (Isaacs C.J., Darling and Atkin JJ.) was delivered by

ISAACS C.J. This case has been ingeniously argued by Mr. Fulton on behalf of the appellant. He contended that although a forged stamp before it was cancelled would be a "stamp" within the meaning of the Stamp Duties Management Act, 1891, it ceased to be a "stamp" within the meaning of the Act when it was cancelled; in other words, a cancelled stamp was not a "stamp" within the meaning of the Act. This contention appears to us to be more ingenious than sound. Sect. 13 makes

1913

REX v. LOWDEN.

it an offence to do or cause or procure to be done any of the acts mentioned; among others, to forge a die or stamp, to print or make an impression upon any material with a forged die, fraudulently to print or make an impression upon any material from a genuine die, and then, in sub-s. 8, knowingly to sell or expose for sale, or utter, or use any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die. When the whole of the section is looked at, it appears to us that the word "stamp" must be construed according to its ordinary meaning in the English language, and it cannot seriously be contended that an obliterated stamp cannot be a stamp in the ordinary use of the English language. There is nothing to justify us in restricting that ordinary meaning in s. 13 because of other sections preceding s. 13. In interpreting a statute we must consider that Parliament intended the words used to mean what they appear to mean, and we think that if it had been intended to restrict the operation of s. 13 creating this offence a definition clause would have been inserted effecting that restriction. The point raised not being in our opinion sound, the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *S. Myers & Son.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. S. H.

LONDON AND PROVINCES DISCOUNT COMPANY *v.* JONES. STANDARD DEVELOPMENTS, LIMITED (CLAIMANTS).

1913
Nov. 3, 4.

Bill of Sale—Grant of, in Consideration of a Sum under Thirty Pounds—Deduction for Expenses—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 12.

A bill of sale was given in consideration of a sum of 27*l.* 18*s.* paid to the grantor and of a sum of 2*l.* 2*s.* paid by the grantee to his solicitor with the grantor's consent towards the legal expenses of the transaction:—

Held, that the bill was not void under s. 12 of the Bills of Sale Act, 1882, as being given in consideration of a sum under 30*l.*

APPEAL from the Lambeth County Court.

By a bill of sale A. H. Jones mortgaged his furniture to the Standard Developments, Limited, the consideration being expressed to be "the sum of thirty pounds (less however the sum of 2*l.* 2*s.* 0*d.* retained thereout by the said mortgagees with the consent of the said mortgagor and paid to the said mortgagees' solicitor towards the costs of and incidental to the preparation, execution, stamping, and registering of these presents) now paid to the said mortgagor by the said mortgagees." The London and Provinces Discount Company having recovered a judgment against Jones and seized the furniture comprised in the bill of sale in execution, the mortgagees claimed it under their bill of sale. On the hearing of an interpleader issue in the county court it was contended for the execution creditors that the bill of sale was void under s. 12 of the Bills of Sale Act, 1882, as having been given in consideration of a sum under 30*l.*, or alternatively that the consideration was not truly stated and that the bill was consequently void under s. 8. The county court judge overruled the contention and gave judgment for the claimants. The execution creditors appealed.

J. B. Matthews, K.C., and *Graham Mould*, for the appellants. The contention that the consideration was not truly stated is not now relied on; but the bill of sale was bad on the ground that it was given in consideration of a sum under 30*l.* The object of the Bills of Sale Act, 1882, was to protect borrowers who are

1913

LONDON AND PROVINCES DISCOUNT COMPANY v. JONES.

largely drawn from the poorer and more uneducated classes, and to ensure, inter alia, that they should receive in cash the sum which was expressed to be the consideration for the bill of sale. For this purpose a payment by the money-lender with the borrower's consent of a debt due by the borrower to a third person is to be treated as a payment in cash to the borrower. A distinction, however, is here to be drawn between the payment on the borrower's account of an existing debt and the deduction of a sum in respect of a debt about to become due; the latter cannot be treated as money then paid. On this ground it was held in *Ex parte Firth* (1) that if the amount of the expenses incident to the preparation of a bill of sale given by way of mortgage is deducted from the sum stated in it as the consideration, and the balance only is actually paid by the lender to the borrower, the consideration is not truly stated and the bill of sale is void, for the liability of the borrower to pay the expenses of the deed does not become a debt due from him until after the deed has been executed and registered and the transaction completed. In that case Jessel M.R. disapproved a judgment of James L.J. in *Ex parte Challinor* (2) in which the payment of the costs of the deed to the lender's solicitor was treated as a payment to the borrower although the money was not then strictly payable. Here the only sum that was paid to the borrower was 27*l.* 18*s.*; and it was the only consideration for the bill within the meaning of the Act.

[BRAY J. Your assumption that the whole of the consideration must be in cash is negatived by the form in the schedule to the Act which runs "in consideration of the sum of £ —— now paid to A. B. by C. D. the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*]." The consideration need not be a sum of money at all, it may be a promise to do something in the future.]

If that is so, then, as the borrower can never be sure that the value of the promise will be as much as the sum for which the bill stands as security, the protection which the Act was designed to afford to poor borrowers would be lacking.

Tindale Davis, for the claimants. When s. 12 of the Act of

(1) (1882) 19 Ch. D. 419. (2) (1880) 16 Ch. D. 260.

1913

LONDON AND PROVINCES DISCOUNT COMPANY v. JONES.

1882 says that the consideration must not be under 30*l.* it means the whole consideration, and not merely the part of it which is paid in cash. "The word 'consideration' is a legal term, it means that which in point of law is the consideration for the giving of the instrument": per James L.J., *Ex parte Challinor.* (1) In that sense it includes the undertaking by the lender to pay the legal expenses for which the borrower will become liable. The very fact that in *Ex parte Firth* (2) the consideration was held to be untruly set forth because the bill stated that the money deducted for the legal expenses which were not yet due was paid at the time of execution is conclusive to shew that the undertaking by the grantee to discharge the grantor's liability for such expenses is part of the consideration.

J. B. Matthews, K.C., in reply.

BRAY J. In this case the county court judge decided that the bill of sale was valid, and the question for us is whether he was right in so holding. The bill was impugned in the Court below on two grounds; first it was said that the bill was given in consideration of a sum under 30*l.*, and was consequently void under s. 12 of the Bills of Sale Act, 1882, and secondly that it did not truly set forth the consideration as required by s. 8. Mr. Matthews now only relies upon the first point, so that the only question that we have to determine is whether the bill was given in consideration of a sum under 30*l.* What is the meaning of the term "consideration" as here used? As we find it used in s. 8 as well as in s. 12 I think we ought to give it the same meaning in both sections; and as used in s. 8 it has already received judicial interpretation in *Ex parte Challinor.* (1) James L.J. there said: "The Act requires that every bill of sale shall set forth the consideration for which it was given . . . . The word 'consideration' is a legal term, it means that which in point of law is the consideration for the giving of the instrument"; and Lush L.J. said: "The Act requires that the bill of sale shall state the consideration for which it is given, by which I understand that which the grantor receives for giving the bill of sale"; and then he proceeded to point out that

(1) 16 Ch. D. 260. (2) 19 Ch. D. 419.

1913

LONDON AND PROVINCES DISCOUNT COMPANY v. JONES.

Bray J.

money paid in discharge of a debt of the grantor was included in what the grantor received. The word "consideration" then means the whole consideration, and therefore a bill of sale is not void under s. 12 unless the whole consideration is a sum under 30*l.* I now turn to the bill of sale in question, and I must assume that the facts as to the consideration are therein correctly stated, for they were not challenged. [He read the statement of the consideration.] Though the consideration is not very artistically stated it is clear that what is meant is that the bill was granted in consideration of 27*l.* 18*s.* paid to the grantor and 2*l.* 2*s.* paid to the grantees' solicitor with the grantor's consent towards the legal expenses of the bill. Under those circumstances is it right to say that the legal consideration is 27*l.* 18*s.* only? I think not. If the section had said that a bill given in consideration of any sum paid under 30*l.* should be void, that would be a different matter, and we might have to consider whether the sum retained in respect of costs was money paid. But the section does not say that and we have no right to introduce into it words which are not there. It is clear that the grantor got more than 27*l.* 18*s.*, for he got a discharge of a debt for legal expenses that, if not then due, would at all events become due in a very short time. Several authorities were cited before us, of which *Ex parte Challinor* (1), to which I have already referred, is distinctly in favour of the view that I take. That case was followed in *Ex parte Firth* (2), in which there was indeed some criticism of James L.J.'s treatment in *Ex parte Challinor* (1) of a deduction for legal expenses being correctly described as money "now paid." The Court in the later case, while recognizing that the liquidation of an existing debt of the grantor could be properly treated as money then paid to him, held that it was otherwise with regard to a deduction for the expenses of the deed itself, which did not become a debt until after the deed was executed. But that criticism did not in any way affect the value of *Ex parte Challinor* (1) as a decision that the consideration means the whole consideration. In my opinion it is not correct to say that the bill in the present case was given in

(1) 16 Ch. D. 260. (2) 19 Ch. D. 419.

consideration of a sum under 30*l.*, and the appeal must consequently be dismissed.

LUSH J. I agree. Mr. Matthews has tried to read s. 12 as if it said that every bill of sale shall be void unless a sum of 30*l.* at least is paid at the time of the execution of the deed. If the section had said that, he might upon the authorities have contended that the money which was retained by the grantees on account of the legal expenses of the deed was not money then paid. But the section does not say that, it says that a bill "given in consideration of any sum under 30*l.*" shall be void. Whether you look at the consideration moving to the grantor or at the consideration moving from the grantees the result is precisely the same, in either case it is a sum of 30*l.* and not less. The grantees paid 27*l.* 18*s.* to the grantor and 2*l.* 2*s.* to their solicitor for the costs of the bill, while the grantor received the benefit of 30*l.*, for he received 27*l.* 18*s.* in cash and got a discharge of his liability to pay 2*l.* 2*s.* for the legal expenses.

The criticism by Jessel M.R. in *Ex parte Firth* (1) of James L.J.'s proposition in *Ex parte Challinor* (2) that the deduction of part of the money on account of the legal expenses of the bill might be treated as money paid to the grantor does not affect the correctness of the decision in the latter case so far as it decided that the consideration which is to be stated is the whole consideration. For these reasons I think that the judgment of the county court judge was right.

Appeal dismissed.

Solicitors for appellants: *Carthew Wheeler & Hancock, for R. J. Clark, Croydon.*

Solicitor for respondents: *Edward Lazarus.*

(1) 19 Ch. D. 419. (2) 16 Ch. D. 260.

J. F. C.

1913
Oct. 21.

FURTADO *v.* CITY OF LONDON BREWERY COMPANY.

Income Tax — Assessment of Profits — Deprivation of Profits on which Computation made—Application to Commissioners for Relief—Power to state a Case—Appeal—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 134—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59.

An application to Commissioners of Income Tax under s. 134 of the Income Tax Act, 1842, for the amendment of an assessment of profits, upon the ground that during the year of assessment the applicant has been deprived of or lost the profits or gains on which the computation of duty charged in the assessment was made, is not an appeal against the assessment, and consequently the Commissioners have no power on such an application to state a case for the opinion of the High Court under s. 59 of the Taxes Management Act, 1880.

Case stated by Commissioners of Income Tax.

The City of London Brewery Company made application to the Commissioners for the General Purposes of the Income Tax Acts for the city of London for relief under s. 134 of the Income Tax Act, 1842 (1), in respect of an assessment of profits for the financial year ending April 5, 1911, in the sum of 63,584*l.* made upon the company under the provisions of Sched. D to the Act of 16 & 17 Vict. c. 34.

The said assessment was arrived at by taking the average of

(1) By s. 134 of the Income Tax Act, 1842, "In case any person charged to the said duties under Schedule D, whether the computation thereof shall have been made on the profits of one year or on an average as herein allowed, shall cease to exercise the profession, or to carry on the trade, employment, or vocation in respect of which such assessment was made, or shall die, or become bankrupt or insolvent, before the end of the year for making such assessment, or shall from any other specific cause be deprived of or lose the profits or gains on which the computation of duty charged in such assessment was made, it shall be lawful for such person or his executors or administrators to make application to the Commissioners for general purposes of the district within three calendar months after the end of such year, and on due proof thereof to their satisfaction the said Commissioners shall cause the assessment to be amended as the case may require, and give such relief to the party charged, or his executors or administrators, as shall be just, and in cases requiring the same the said Commissioners shall direct in manner before mentioned repayment to be made of such sum as shall have been overpaid on the assessment amended or vacated."

the company's profits up to December 31 in each of the three preceding years 1907, 1908, and 1909.

By s. 43 of the Finance (1909-10) Act, 1910, certain new duties were charged on licences for the manufacture and sale of beer, and the company had to pay in respect of the said new licence duties for the year ending December 31, 1910, the sum of 27,000*l.* The profits for the year ending December 31, 1910, were by reason of the said new licence duties reduced from 63,584*l.* to 36,584*l.*, and the company applied to the Commissioners to amend the assessment of profits accordingly and to direct repayment to them of the amount of income tax overpaid.

It was contended on behalf of the surveyor of taxes: 1. That the company had not been deprived of or lost the profits or gains on which the computation of duty charged in the assessment was made. 2. That the loss referred to in the section must be a loss of all the profits, and that in the year of assessment the company made a profit and not a loss. 3. That the "specific cause" under the section must be ejusdem generis with the causes of relief mentioned in the previous part of the section.

The Commissioners having taken evidence and considered the several contentions were of opinion that the company were entitled to the relief claimed and that the above facts constituted a specific cause as aforesaid within the meaning of the said section, and they directed that the assessment should be reduced from 63,584*l.* to 36,584*l.* and that a certificate for repayment of 1575*l.*, being the amount of income tax overpaid, should be signed and issued.

The surveyor of taxes being dissatisfied with the determination of the Commissioners as being erroneous required them to state a case for the opinion of the High Court, which they accordingly stated.

Sir John Simon, A.-G., and *Finlay*, for the appellant.

Ryde, K.C., and *Bremner*, for the respondents. There is a preliminary objection that the Commissioners had no power to state a case. The only power to state a case is that given by s. 59 of the Taxes Management Act, 1880, and that section

1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

only authorizes the statement of a case "upon the determination of any appeal." But an application to the Commissioners for relief under s. 134 of the Income Tax Act, 1842, is not an appeal against the assessment. It assumes that the assessment was rightly made on a correct computation of the average profits of the three preceding years, but says that owing to one of the causes mentioned in the section the actual profits of the year have fallen short of the average, and asks for a return of the income tax overpaid. In *Bruce* v. *Burton* (1), a case decided under s. 27 of the Finance Act, 1896 (59 & 60 Vict. c. 28), and s. 23 of the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), both of which sections are in pari materia with the section before the Court and give a corresponding relief, the former in the event of the profits of the occupation of land under Sched. B falling short of one-third of the annual value, and the latter in the event of a loss (inter alia) by husbandry, it was held that the application to the Commissioners for a return of the tax overpaid was not an appeal and that they had consequently no power to state a case under the Act of 1880.

Sir John Simon, A.-G. The application to the Commissioners for relief under s. 134 of the Act of 1842 was an appeal against the assessment. It is incorrect to say that the assessment was right at the time when it was made, for it was an assessment of prospective profits and was provisional only, being liable to amendment if by reason of subsequent facts it turned out to be wrong. In such case the section says that the Commissioners "shall cause the assessment to be amended," and an application for such amendment is an appeal. In *Bruce* v. *Burton* (1) there was no application, as there was here, for an amendment of the assessment, for neither of the sections there dealt with say anything about the assessment being amended, and under s. 23 of the Act of 1890 the application is expressed to be "for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year," and it may be that an application of that nature cannot be regarded as an appeal. There is indeed a dictum by Wright J. in *Grimes* v.

(1) (1901) 4 Tax Cases, 399.

Lethem (1) that there is no appeal from a decision of the Commissioners upon an application for a return of income tax under s. 23 of the Customs and Inland Revenue Act, 1890. But for the reasons above given that Act is distinguishable from the Act before the Court, and further the dictum in question was obiter only, the decision having turned upon the ground that the procedure of that Act as to notice to the surveyor of taxes had not been followed. The section with which the Court is now dealing, s. 134 of the Act of 1842, is one of a fasciculus of sections beginning with s. 118 and dealing with the remedies of persons aggrieved by overcharge of income tax. Sect. 118 provides that any person who shall think himself aggrieved by any assessment may appeal to the Commissioners within a limited time, and that "no appeal shall be received after the time so limited except on the ground of diminution of income as herein mentioned." The only sections in which the subject of diminution of income is therein mentioned are ss. 133 and 134, which are in identical terms as to the form of the application to the Commissioners. It is therefore clear that the draftsman of the Act treated applications under those two sections as appeals. That was evidently the view taken by the Court of Session in *Russell* v. *North of Scotland Bank*. (2) There a bank which in October, 1888, discovered that it had been assessed on too large a sum for the year 1888-9 neglected to apply for a certificate of overpayment till July, 1890. Sect. 133 of the Act of 1842, under which the application was made, requires that it shall be made "within or at the end of the year current." The Commissioners held that the application was not too late, and granted a certificate, and on the requisition of the surveyor stated a case for the opinion of the Court, leaving to them two questions: (1.) whether the decision of the Commissioners was subject to appeal, and (2.), if it was, whether they ought to have granted the certificate. It was argued for the bank that the application to the Commissioners was not an appeal, and therefore there was no appeal from them to the Court under s. 59 of the Act of 1880, which is the very point taken here. But the Court heard the appeal and reversed the decision of the

(1) (1898) 3 Tax Cases, 622. (2) (1891) 18 R. 543.

1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

Commissioners. It is true that the judgment of the Lord President did not deal with the point as to whether there was an appeal at all, but in the absence of explanation it must be assumed that the Court decided it, and in the affirmative. It is to be observed that in that case the Court had cited before them the case of *Reg.* v. *Income Tax Commissioners* (1), in which Lord Esher M.R. expressed the opinion that if on an application under s. 133 the Commissioners exercise their jurisdiction there is no appeal from their decision. But that dictum was only obiter, and the Court apparently declined to follow it.

[SCRUTTON J. Is the term "appeal" ever applied to an application to review the decision of on inferior tribunal on the ground of something which has happened since the decision?]

Yes; in the Court of Criminal Appeal an application for the reduction of a sentence, on the ground that since it was given restitution had been made to the injured person, is treated and spoken of as an appeal.

Ryde, K.C., in reply. If the Commissioners on the hearing of an application for return of overpaid income tax go so wrong that they are acting altogether outside their jurisdiction there is a remedy by certiorari, and that is presumably the explanation of *Russell* v. *North of Scotland Bank.* (2) In that case the application to the Commissioners was made too late, and in entertaining it at all they acted without jurisdiction. All that the Court of Session there decided was that the order of the Commissioners must be set aside as having been made without jurisdiction; they did not enter into the merits, and therefore the question whether an appeal would lie did not arise. There can be no remedy by appeal unless it is expressly given by statute, and here the statute does not expressly give one. Sect. 134 says the Commissioners shall "give such relief to the party charged . . . . as shall be just," and that is not apt language to express a right of appeal.

SCRUTTON J. The Commissioners for General Purposes for the City of London have stated a case in the matter of an application

(1) (1888) 21 Q. B. D. 313. (2) 18 R. 543.

which was made to them by the City of London Brewery Company to amend an assessment of profits for the financial year ending April 5, 1911, by reason of certain facts which shewed a loss of profits or gains within the year. The Commissioners decided that the company were entitled to the relief claimed and directed that the assessment should be reduced. The surveyor of taxes thereupon asked the Commissioners to state a case, and they stated it accordingly, the company objecting that the Commissioners had no power to do so, that their decision under s. 134 and their certificate were final and conclusive, and that no right of appeal existed. The Commissioners referred the Court to the decision of the Court of Appeal in *Reg.* v. *Income Tax Commissioners* (1) presumably because Lord Esher in giving judgment in that case stated that in his opinion "there is no appeal from their decision" on the question whether there ought to be a repayment or not.

The Taxes Management Act, 1880, by s. 59 provides that "immediately upon the determination of any appeal under the Income Tax Acts by the General Commissioners" the appellant or the surveyor may declare his dissatisfaction and require the Commissioners to state a case which will set forth the facts and the determination. That is a right of appeal from the decision of the Commissioners in matter of law given by statute, and it arises immediately upon the determination of an appeal under the Income Tax Acts. In a proceeding which is not an appeal under the Income Tax Acts there is no power given by statute to state a special case and no appeal lies. The question therefore is whether a proceeding which is taken under s. 134 is an appeal to the Commissioners. If it is an appeal the Act of 1880 gives a right to appeal from them to the High Court by special case. Now s. 134 of the Act of 1842, and s. 133 of the same Act, now repealed, both assumed an assessment properly made and not appealed against, and provided that, though it was right at the time when it was made, in the event of certain things happening subsequently to the assessment which would cause it to operate hardly upon the party charged he should be entitled to have it amended. If the matter stood there, and I had

(1) 21 Q. B. D. 313.

1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

Scrutton J.

only s. 134 of the Act of 1842 to deal with, I should have thought that an application under that section could not be properly described as an appeal. It is more properly described as an application for relief. An appeal imports that the decision appealed against was wrong, whereas, as I have said, s. 134 assumes that the assessment was right when it was made. For the view that such an application for relief is not an appeal it is said that I have the support of the decision in *Bruce* v. *Burton* (1) by which I am bound. That case arose under s. 27 of the Finance Act, 1896, and s. 23 of the Customs and Inland Revenue Act, 1890. The former of those sections provided that the income arising from the occupation of land under Sched. B should be taken to be one-third of the annual value, but that if the actual profits of such occupation in any year were shewn to be less than that figure the income should be taken at the actual amount, and any sum overpaid should be repaid. The latter provided that on proof of a loss by a farmer he might apply "for an adjustment of his liability." The appellant was refused relief by the Commissioners and a special case was stated. The Crown took the objection that there was no power to state a case, and the Court refused to hear it on the ground that there was no appeal against the assessment which was taken to be rightly made, the application to the Commissioners being "for a return ex post facto," that is to say, for relief on the ground that something had happened after the making of a proper assessment. Looking only at s. 134 and comparing it with the sections on which *Bruce* v. *Burton* (1) was decided I can see no substantial distinction between them. Moreover the decision in *Bruce* v. *Burton* (1) is supported, so far as obiter dicta can support anything, by the dictum of Wright J. in *Grimes* v. *Lethem* (2), a case also under s. 23 of the Act of 1890, that on the question what adjustment of liability the Commissioners will make or what repayment they will authorize "no appeal has been provided," and also by that of Lord Esher in the case of *Reg.* v. *Income Tax Commissioners* (3) to which I have already referred. But it was contended that there is a distinction between those cases and the

(1) 4 Tax Cases, 399. (2) 3 Tax Cases, 622.
(3) 21 Q. B. D. 313.

present, the argument of the Crown as I understand it being this,—it is said that whatever may be the case under the Act of 1890 it is different when you come to the Act of 1842, because there, although if you looked at s. 134 alone you might say that the application was not an appeal, there is a statutory interpretation of the section provided in the Act itself. It is said that if you look at s. 118 you will find that any person aggrieved by an assessment may appeal within a certain time to the Commissioners, provided that "no appeal shall be received after the time so limited except on the ground of diminution of income as herein mentioned," and that the only sections in the Act in which the subject of relief in consequence of diminution of income is dealt with are ss. 133 and 134; that therefore the draftsman intended that the proceeding under s. 134 should be treated as an appeal; and that in accordance with that intention s. 134, whatever the language in which it is expressed, must be read as having given an appeal. But I am not disposed to take that view. I do not think that a provision put in possibly ex majore cautela in one clause of an Act can have the effect of changing the interpretation to be put upon the language of another clause if the language of the latter clause is in itself clear; and the language of s. 134 is to my mind fairly clear. It speaks of an application to the Commissioners to amend an assessment in consequence of something that has happened after it was made, and that language seems to me quite inconsistent with the idea of the application being an appeal. For these reasons I do not feel bound to give effect to the language of s. 118 as interpreting s. 134. I am therefore of opinion that from a decision of the Commissioners on an application under s. 134 no appeal lies by way of special case, and that the preliminary objection taken by Mr. Ryde to the hearing of the appeal is a good one.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Godden, Son & Holme.*

J. F. C.

C. A.
1913
July 24, 25, 26, 28; *Oct.* 16.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE LOCAL GOVERNMENT BOARD. *Ex parte* ARLIDGE.

Local Government Board—Powers and Duties—Closing Order—Refusal of Local Authority to determine—Appeal—Public Local Inquiry—Report of Inspector — Confidential Document — Right of Appellant to be heard—Housing, Town Planning, &c. Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39—*Housing of Working Classes, England, Rules, January* 11, 1910, *rr.* 1, 4, 5, 8, 9.

By s. 17, sub-s. 6, of the Housing, Town Planning, &c. Act, 1909, if, on the application of any owner of a dwelling-house, a local authority, which has made a closing order under sub-s. 2, refuse to determine the order, the owner may appeal to the Local Government Board.

By s. 39 of the Act the procedure on any such appeal shall be such as the Local Government Board may by rules determine: provided that the rules shall provide that the Board shall not dismiss any appeal without having first held a public local inquiry.

By rules made under this section it is provided that every appeal to the Local Government Board shall be made to and brought before the Board by means of a letter or other representation in writing, and that the Board shall not dismiss an appeal without having first held a public local inquiry.

The owner of a dwelling-house applied to a local authority to determine a closing order which had been made in respect thereof and on the refusal of the local authority to do so appealed to the Local Government Board. A public local inquiry was directed to be held by an inspector appointed by the Board, who after holding the inquiry and after a personal inspection of the premises made certain reports to the Board. The Board dismissed the appeal without having disclosed to the appellant the contents of their inspector's reports and without having given him an opportunity of being heard by the member of the Board who was going to determine the appeal.

On an application to quash the order of the Board dismissing the appeal on the ground that the appeal had not been determined in manner provided by law:—

Held by Vaughan Williams and Buckley L.JJ., Hamilton L.J. dissenting, that it was contrary to the principles of natural justice for the Board to dismiss the appeal without disclosing to the appellant the contents of their inspector's reports, and without giving the appellant an opportunity of being heard (not necessarily viva voce) by the Board

in support of the appeal, and that the order of the Board dismissing the appeal must, therefore, be quashed.

Decision of the Divisional Court [1913] 1 K. B. 463, reversed.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD ARLIDGE, *Ex parte.*

APPEAL from a decision of a Divisional Court (1) discharging a rule nisi for a certiorari directed to the Local Government Board in the following circumstances.

The mayor, aldermen, and councillors of the metropolitan borough of Hampstead, being a local authority within the meaning of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), and the Housing, Town Planning, &c. Act, 1909 (9 Edw. 7, c. 44), made an order called a closing order, under s. 17, sub-s. 2, of the later Act (2), prohibiting the use for human habitation of a certain dwelling-house, No. 83, Palmerston Road. One William Arlidge was the assignee of a lease of the dwelling-house and the owner thereof within the meaning of the Act. He subsequently applied to the borough council to determine the closing order under s. 17, sub-s. 6, of the same Act. The borough council having refused this application William Arlidge appealed under the same section to the Loca Government Board, who by an order dated February 26, 1912, made under the seal of the Office, signed by the President, and countersigned by a secretary, confirmed the refusal of the borough council to determine the closing order. The rule nisi was obtained on the application of William Arlidge to remove this order into the High Court for the purpose of having it quashed.

The ground on which the rule was moved was that the Local Government Board had not determined the appeal in manner provided by law.

From the affidavit of William Arlidge, the applicant, in support of the rule the following facts appeared:—

On January 12, 1911, the Hampstead Borough Council, under s. 17, sub-s. 2, of the Housing, Town Planning, &c. Act, 1909, made a closing order prohibiting the use of the dwelling-house for human habitation until in their judgment it was rendered fit for that purpose.

(1) [1913] 1 K. B. 463. (2) See note on p. 204, post.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

On March 7, 1911, the applicant gave notice of appeal against the closing order to the Local Government Board under s. 17, sub-s. 3, of the Act. The Local Government Board replied by letter that they were not prepared to decide this appeal without having first held a public local inquiry.

On May 24, 1911, a public local inquiry into the subject-matter of the appeal was held by an inspector appointed by the Local Government Board. The applicant, having already put the Local Government Board in possession of all the information in his power, did not attend this public inquiry.

On May 23 the applicant through his solicitors wrote to the Local Government Board expressing the hope that after the inquiry was held he would be allowed the opportunity of appearing and stating his case before the authority by whom the matter was to be dealt with. This request was repeated in a letter of June 13, 1911. The Local Government Board acknowledged the receipt of these letters, but did not accede to the request.

On July 29, 1911, the Local Government Board, without giving any information as to the nature or contents of the report of their inspector or allowing the applicant any further opportunity of being heard before the Local Government Board or the authority by whom the appeal was to be actually decided, made an order confirming the closing order and ordering the applicant to pay costs. An application was then made to the Local Government Board to state a special case under s. 39, sub-s. 1 (*a*), of the Act of 1909, but the Board refused to do this.

On July 10, 1911, the applicant had applied to the Hampstead Borough Council to determine the closing order under s. 17, sub-s. 6, of the Act of 1909. In answer to this application, after certain immaterial correspondence had passed, a notice dated November 2, 1911, was served upon the applicant to the effect that the borough council refused to determine the closing order. On November 15 the applicant gave notice of appeal against this refusal.

On November 25 the applicant received notice from the Local Government Board to the effect that the Board proposed to direct a public local inquiry into the matter of this appeal and that

notice of the date of the inquiry would be given to him; the notice further drew attention to the Rules as to appeals to the Board under Part I. of the Act of 1909 and requested the applicant to furnish the Board with the original documents of refusal to determine the closing order. The applicant replied protesting against the inquiry, which was, nevertheless, held on December 8, the applicant being represented thereat by his solicitor. No information was given as to the nature or contents of the report of the inspector before whom this second inquiry was held, and the applicant was not allowed an opportunity of being heard before the Local Government Board or the authority by whom the appeal was actually to be decided. On February 26, 1912, the Local Government Board made the order signed and sealed as above mentioned confirming the refusal of the borough council to determine the closing order and ordering the applicant to pay costs.

The applicant further stated in his affidavit that it was the practice of the Local Government Board to consider as confidential the reports made in such cases by their inspectors after the holding of a public local inquiry and to refuse to disclose to the appellant the nature and contents thereof.

A rule nisi having been granted, the following evidence was filed on behalf of the Local Government Board:—

An affidavit of Edward Leonard, the Local Government Board inspector, who held the inquiries on May 24 and December 8, 1911, respectively, stated that before the first inquiry was held notice thereof was given to the applicant's solicitors and public notice thereof duly posted stating that the inspector would be prepared to receive the evidence of any persons interested in the matter of the appeal. The applicant's solicitor was present during part of the inquiry, but took no part in the proceedings. The inspector stated publicly that after hearing witnesses for the applicant and the borough council he would be prepared to hear the evidence of any persons who could satisfy him that they were interested in the appeal. He called upon the applicant to state the grounds of his appeal. There was no answer, but the town clerk of Hampstead stated that he had received a letter from the applicant's solicitors to the effect that the applicant did

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

not intend to take any part in the proceedings. After hearing all the witnesses who desired to give evidence the inspector stated publicly that he proposed to inspect the premises forthwith and invited both parties to the appeal to accompany him. Being unable to get access to the premises on May 24, the inspector on May 31 served notices on the applicant and on the occupier of the premises that he intended to enter them on June 2 for the purpose of survey and examination. On that date he inspected the premises in the presence of the applicant and others. On May 27 the inspector made his report and submitted the evidence and report to the Local Government Board. On June 5 he submitted his report of his inspection of the premises.

Before the second inquiry notices were served and posted as on the first inquiry. The applicant was present with his solicitor and witnesses. The inspector heard all the witnesses called for the applicant, including the applicant himself. After hearing all the witnesses and the arguments on behalf of the applicant by his solicitor, the inspector went to the premises accompanied by the applicant and others and carefully inspected the premises. He stated that he carefully considered the evidence as to the condition of the premises with the facts observed by him at the inspection, and, as a result of such consideration, on December 13, 1911, he made a full report to the Local Government Board, submitting with it a transcript of the shorthand note taken by agreement of the evidence given at the inquiry.

An affidavit of Sir Horace Cecil Monro, K.C.B., Permanent Secretary to the Local Government Board, contained the following statements:—

"Par. 2. The order of the Local Government Board dated February 26, 1912, was made after a full and careful consideration of the reports made by their inspector, Edward Leonard, and the evidence and documents which accompanied those reports. A large number of observations and objections put forward on Mr. Arlidge's behalf by his solicitors were also considered, and before a final decision was come to Mr. Arlidge was invited by letter dated January 8, 1912, and addressed to his solicitors to place before the Board for their consideration any further statement which he might desire them to consider with reference to

the subject-matter of his appeal before the making of the order.

"Par. 4. . . . . The Board also received from the town clerk of Hampstead . . . . a copy of the representation of the borough medical officer.

"Par. 16. A shorthand note of the proceedings and evidence at the inquiry together with his report were submitted to the Board by their inspector, and were duly considered, and on the 8th day of January, 1912, a letter was written to Mr. Arlidge's solicitors pointing out that the Board would take into consideration the whole of the circumstances, and stating that the Board would be willing to consider any further statement which Mr. Arlidge might desire to submit to them with reference to the subject-matter of his appeal. This is the letter referred to in paragraph 2 hereof.

"Par. 19. On the 9th day of February, 1912, the said solicitors wrote to the Board complaining of the delay in giving their decision. No suggestion was made, either in this or in the earlier letters, that Mr. Arlidge desired to bring to the notice of the Board any further facts, beyond what transpired at the inquiry.

"Par. 20. After careful and impartial consideration of the facts and the evidence given at the said inquiry and the report of their inspector, an order was made on the 26th February, 1912, under the seal of the Board, signed by the President, and countersigned by an assistant secretary, confirming the said refusal of the borough council to determine the said closing order.

"Par. 21. As indicated in their letter of the 8th January, 1912, any further statement of facts, had Mr. Arlidge desired to submit the same, would have been duly and fully considered, but it is submitted that in the absence of such statement the Board were bound to decide upon the facts then before them, and that the said appeal has been heard and determined according to law.

"Par. 22. The said appeal has been determined judicially upon the report of the inspector and the evidence taken by him (though without any further hearing of the appellant save at the said inquiry) in the same manner in all respects as other

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

appeals to the Board have been accustomed to be determined under the various statutes prior to the Housing, Town Planning, &c. Act, 1909, which have given appeals to the Board, and it is submitted that no other form of procedure than that adopted by the Board in this case was intended or required by the said Housing, Town Planning, &c., Act, 1909."

The Divisional Court (Ridley, Lord Coleridge, and Bankes JJ.) discharged the rule.

The applicant appealed.

The appeal was heard on July 24, 25, 26, and 28, 1913.

Macmorran, K.C., and *Upjohn, K.C.* (*Brooke Little* with them), for the appellant. The Housing, Town Planning, &c. Act, 1909, introduced a new procedure in the case of closing and demolition orders where a dwelling-house is in a state so dangerous and injurious to health as to be unfit for human habitation. Under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), after a closing order had been made by a Court of summary jurisdiction under s. 32, the local authority might in a proper case make a demolition order under s. 33, with a right to the person aggrieved to appeal to quarter sessions under s. 35 against the order of the local authority. The appeal to quarter sessions was heard by a judicial tribunal. That procedure has been abolished, and under ss. 17 and 18 of the Housing, Town Planning, &c. Act, 1909, the local authority may make closing and demolition orders, or an order determining a closing order. In each case an appeal is given to the Local Government Board, and the procedure on appeal is regulated by rules made under s. 39, sub-s. 1 of which provides that the Board shall not dismiss an appeal without having first held a public local inquiry. The appeal to the Local Government Board is, like the old appeal to quarter sessions, a judicial proceeding. The Board has power to award costs, and the orders appealed from may deprive the appellant of his property. The appellant therefore has a right to be heard before the Board. The inspector who holds the public local inquiry is not the person who has to decide the appeal; he merely reports to the Board, and the Board has to decide. The Local Government Board may not be a "Court"

in the strict sense of that term, but it has to proceed judicially, and must give the appellant an opportunity of being heard and of commenting on the facts and evidence. It is contrary to natural justice that an appeal should be determined adversely to the appellant, with the result of depriving the appellant of his property, without giving him an opportunity of being heard orally by the person who has to determine the appeal. The determination of the appeal is a proceeding inter partes, namely, the owner of the premises and the local authority. The Board has power under s. 39 to make rules as to the procedure on appeals, but a rule which provided that the parties should not be heard, or should only be heard by means of written statements, would be ultra vires as being contrary to natural justice.

Secondly, the Local Government Board, having in this matter to act judicially, had no right to receive and act upon evidence which the appellant had not seen or heard. According to the affidavit of Sir Horace Monro the order of February 26, 1912, confirming the refusal of the borough council to determine the closing order, was made after a full, careful, and impartial consideration of the facts and of the reports of the inspector and of the evidence and documents which accompanied those reports. There were three reports of the inspector, two being his reports of the inquiries, and the third his report of his own inspection of the premises, none of which were shewn to the appellant. They were treated as confidential documents. Under the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), the Board consists of certain high officers, and by s. 5 any act to be done on behalf of the Board may be done in the name of the Board by the President or by any member thereof, or by a secretary or assistant secretary, if such secretary or assistant secretary is authorized to do the same by any general order of the Board. Therefore presumably the order of February 26, 1912, in the present case, which is duly sealed and signed, was made by one of the persons above mentioned, and he took into consideration the reports of the inspector and certain evidence which the appellant was not allowed to see or hear. Upon the occasion of making his first report the inspector viewed the house and made a special report

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

upon that. That amounted to the inspector actually giving evidence in the absence of the appellant, the purport of which the appellant was not allowed to know. The affidavit of Sir Horace Monro also shews that a report of the local medical officer of health was considered, and this report was not shewn to the appellant. It is not suggested that the local authority in making these orders acts judicially, but the Local Government Board does act judicially. The appeal to the Board has been dismissed upon reports and documents which the appellant has never seen, and without his having been given an opportunity of commenting upon them. The appellant has no means of knowing whether this appeal was determined by a proper official of the Board, but in any case the appeal has not been heard and determined judicially. It is contrary to natural justice for the Board to hear and determine the appeal in that way. With regard to the cases relied upon by the other side in the Court below, the questions in *Parsons* v. *Lakenheath School Board* (1) and *Board of Education* v. *Rice* (2) were of a departmental character. There is no power under the Local Government Board Act, 1871, for the officer to delegate his duty to decide the matter himself; and in the latter case Lord Loreburn L.C. said that "they"—the Board of Education—"must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not say they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." [*Rex* v. *Local Government Board* (3) was also referred to.]

Sir J. Simon, *S.-G.*, and *Branson*, for the respondents the Local Government Board. It is conceded that the Local Government Board in determining an appeal against the refusal of a local authority to determine a closing order must act in a judicial manner, though the Board is not in the same position as a Court

(1) (1889) 58 L. J. (Q.B.) 371. (2) [1911] A. C. 179.
(3) [1911] 2 I. R. 331.

of justice and the appellant and the local authority are not litigants in the ordinary sense of the word. A statement of appeal, containing the grounds of appeal and the details of the case, is put before the Board, and if the Board thinks fit it can allow the appeal and determine the closing order without anything further, except that in that case the local authority would first be afforded an opportunity of putting its views in writing before the Board. But the appeal would be determined without any public local inquiry being held. If, however, the Board contemplates that the appeal may be dismissed, then a public local inquiry has first to be held by the Board. The Board appoints an inspector as its officer to preside at the inquiry. His duties are, not to pronounce judgment, but to hear the evidence and arguments and to make a report to the Board. The machinery of local inquiries has been known in connection with the Local Government Board for many years and is to be found in numerous statutes. It has always been the practice, as the Legislature may be presumed to have known, for the reports of the inspectors to be treated as confidential documents, and there is nothing in the Act of 1909 to suggest that a different practice was to be adopted. It is not contrary to natural justice that the decision of the Board should be pronounced on arguments which have not been heard by the Board but which have been reported to the Board by the inspector who actually heard them. In the present case every word of the evidence and arguments at the inquiry was taken down in shorthand, so that it cannot be said that the appellant's case was not fully before the Board. In so far as the inspector in his report expresses his own opinion on the evidence and arguments, and on information gained by his inspection of the premises, different considerations apply. The inspector is then acting as a skilled expert delegated by the Board to perform duties which it is impossible for the members of the Board to do individually. His position is analogous to that of a nautical assessor in an admiralty case, or of an assessor in a patent case, from whom the judge obtains an expression of opinion in order to assist him in deciding the case, but which is never communicated to the parties: *The Banshee.* (1) No doubt an

(1) (1887) 56 L. T. 725.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

appellant is entitled to be heard by the Board before his appeal is determined, but there is nothing in the Act to say that he is to be heard orally. The inquiry which is held by the Board through its inspector is the hearing. The appellant was none the less heard by the Board although the members of the Board were not actually present at the inquiry. In transferring this jurisdiction from quarter sessions to the Local Government Board it was not intended that there should be that close attachment to forms of legal procedure which is undoubtedly desirable in Courts of justice. Economy and despatch were the objects aimed at. In the words of Wright J. in *Rex* v. *Local Government Board* (1), "They" (the Local Government Board of Ireland) "are a great central controlling body, and to apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal seems to me completely to mistake their true position and functions."

[BUCKLEY L.J. Can it be said that the report of the inspector appointed to hold a "public" local inquiry is private and confidential and not a public document?]

The fact that s. 39 provides that the inquiry is to be public does not warrant the inference that reports which had hitherto always been treated as private and confidential were intended in future to be made public. The object of inserting this provision was to make it clear that the public had a right to be present at the inquiry, as to which there had previously been some doubt. The result of the inquiry is made public by the announcement of the determination of the appeal. With regard to the representation of the medical officer of the local authority, that was no doubt seen by the member of the Board who decided the appeal and not by the appellant. It stands on the same footing as the report of the inspector, but it was in fact a purely formal document which contained no statement of fact beyond what was necessary to initiate the proceedings of the closing order. Its non-production was not one of the grounds on which the rule was moved, nor was it relied on in the Divisional Court.

The Board in coming to a decision had before it the whole of the evidence and of the arguments, and there is the

(1) [1911] 2 I. R. at p. 347.

uncontradicted statement of the Permanent Secretary that the matter has received careful and impartial consideration. In these circumstances the Court ought not to grant a certiorari, for which the only ground suggested is that the proceedings of the Board were contrary to natural justice. [*Attorney-General* v. *Nottingham Corporation* (1) was referred to.]

S. G. Turner, for the respondents the Hampstead Borough Council.

Upjohn, K.C., in reply. It is quite clear that both the appellant and the local authority are in the position of ordinary litigants. Either party can apply under s. 39 for a special case to be stated, and under r. 8 either party may be ordered to pay the costs of the appeal. Both parties are, therefore, entitled to be heard by the tribunal which has to decide the appeal. The duties of the inspector are similar to those of a referee appointed under s. 13 of the Arbitration Act, 1889, for inquiry and report, whose report is always shewn to the parties. It is contrary to natural justice that the tribunal should have before it documents bearing on the case which are not shewn to the parties.

[HAMILTON L.J. Sect. 8 of the Criminal Appeal Act, 1907, provides that the judge before whom a person is convicted shall in the case of an appeal furnish a report to the Court of Criminal Appeal giving his opinion upon the case or upon any point arising in the case. Rule 15 (*b*) of the Criminal Appeal Rules, 1908, provides that these reports shall not be furnished to the prisoner except by leave of the Court. Is that contrary to natural justice?]

There is nothing in the Criminal Appeal Act to say that the judge's report is not to be shewn to the prisoner, and, were it not for the fact that under r. 15 the Court may allow the report to be seen, it might well be contended that r. 15 is ultra vires. Under the Act of 1909 the Local Government Board has for the first time to adjudicate upon matters affecting the common law rights of individuals. That is why the inquiry is made public, and it is a contradiction in terms to say that an inquiry shall be public but that the report shall be kept private. An appellant under this Act ought not to be deprived of his property without

(1) (1904) 2 L. G. R. 698.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

an opportunity of seeing his judge and arguing his case before him. A written statement is a lifeless thing compared with a viva voce argument. Moreover, if the report is not shewn to the appellant he does not know what points to deal with in his written statement. He cannot criticize the evidence which has most impressed the inspector or endeavour to remove views which he considers erroneous. By s. 39 a special case may be stated "at any stage of the proceedings," but without seeing the report the appellant cannot decide whether there are any and what points on which he wants a special case.

Cur. adv. vult.

1913. Oct. 16. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case the appeal is an appeal against the order of the King's Bench Division discharging a rule nisi obtained for a certiorari calling upon the Local Government Board to shew cause why an order of February 26, 1912, dismissing the appeal of the applicant to the Board, should not be quashed on the ground that the Board had not determined the appeal in manner provided by law.

In form the rule nisi ordered the Local Government Board to shew cause why a writ of certiorari should not issue directed to the Local Government Board to remove into the King's Bench Division all and singular the order given under seal of office of the said Board, and the hands of the said John Burns, President, and Walter T. Jerred, assistant secretary of the said Board, and bearing date on about February 26, 1912, upon the appeal of William Arlidge against the refusal of the mayor, aldermen, and councillors of the metropolitan borough of Hampstead to determine a certain order made by them in pursuance of sub-s. 2 of s. 17 of the Housing, Town Planning, &c. Act, 1909, prohibiting the use for human habitation of a certain dwelling-house situate and being No. 83, Palmerston Road, in the said borough, on the ground that the said Local Government Board had not determined the appeal against such refusal in manner provided by law, at the instance of the said William Arlidge, "upon notice of this order to be given to the said Local Government Board and the said aldermen and councillors in the meantime."

I may mention that I included the final statement in this document for the purpose of shewing the first instance in which the authorities, that is to say, the Court of King's Bench, were treating the Local Government Board and the said aldermen and councillors as parties to a lis.

In substance the main point argued before us was that the procedure of the Local Government Board on the hearing of the appeal to them against the order of the mayor, aldermen, and councillors of the metropolitan borough of Hampstead refusing to determine, that is to say, put an end to, a certain order made by them prohibiting the use for human habitation of No. 83, Palmerston Road, in the said borough, was contrary to natural justice. The points in respect to which it was argued before us on behalf of the appellant that the procedure adopted by the Local Government Board was contrary to natural justice were in substance two; first, that the appellant had no opportunity of being heard by the member or members of the Local Government Board who in fact decided this appeal, although after the conclusion of the public inquiry, in fact, the report of Inspector Leonard, who presided at the public inquiry, was sent to the Board for their consideration as well as his report of an inspection of the condemned house, and a report of a medical expert; secondly, the refusal of the Local Government Board to disclose the said reports taken into consideration by those who decided the appeal. The Divisional Court decided against the appellant on both these points; and decided generally that there was nothing in the procedure of the Local Government Board which was contrary to natural justice.

In this appeal it is plain that our decision must turn in law upon the proper construction of the Housing, Town Planning, &c. Act, 1909 (and upon the Statutory Rules thereunder), which is a statute amending the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 20), called in the later Act of 1909 "the principal Act." Sects. 32 and 33 of "the principal Act" are repealed and replaced by ss. 17 and 18 of the Act of 1909, which substitute the department of the Local Government Board for a Court of quarter sessions. By s. 35 of the principal Act any person aggrieved by an order of the local authority might

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Vaughan Williams L.J.

appeal to a Court of quarter sessions; but by s. 17, sub-s. 3, of the Act of 1909 an appeal to the Local Government Board from a closing order is given to the owner aggrieved, and, by sub-s. 6 of the same section, an appeal from a refusal of a local authority to determine a closing order lies to the Local Government Board. In construing the Act, one must of course take into consideration the Rules of January 11, 1910, with reference to appeals made under the powers contained in sub-s. 1 of s. 39 of the Act of 1909. Sect. 39, sub-s. 1, provides that "the procedure on any appeal under this part of this Act, including costs, to the Local Government Board shall be such as the Board may by rules determine, and on any such appeal the Board may make such order in the matter as they think equitable, and any order so made shall be binding and conclusive on all parties, and, where the appeal is against any notice, order, or apportionment given or made by the local authority, the notice, order or apportionment may be confirmed, varied, or quashed, as the Board think just. Provided that (*a*) the Local Government Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal: and (*b*) the rules shall provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry."

Such being the Act and Rules, it is absolutely necessary to determine the nature of the appeal in dealing with the contention that the procedure adopted by the Local Government Board was contrary to natural justice. Is it an appeal inter partes, that is to say, an appeal to which Mr. Arlidge and the Hampstead Borough Council are opposing parties; or is it true to say that there is no lis inter partes? In my opinion the terms of s. 39 of the Act of 1909, coupled with the various notices directed in the Act and Rules, are sufficient to shew that the Act intended the appeal to be a lis inter partes as between the person alleging that he was aggrieved by the order and the local authority. I do not mean that the Act intended that the appeal should necessarily be treated merely as a lis inter partes; but I do think that in cases where the Board has to ascertain the law and also the facts,

the Board acting in good faith and fairly listening to both sides must disclose all the evidence of fact placed before them, and also the conclusions in law adopted by them as the basis of their decision. This seems to me absolutely consistent with the words of the Lord Chancellor, Lord Loreburn, in *Board of Education* v. *Rice* (1), and also with the judgments of Lord O'Brien C.J. and Madden J. in *Rex* v. *Local Government Board* (2), both of which cases are cited by the learned judges in the Divisional Court. Lord Loreburn in *Board of Education* v. *Rice* (3), says: "They" (the Board of Education) "can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." How can the parties get a fair opportunity of correcting or contradicting any relevant statements prejudicial to their view, if the statements placed before the Board are withheld and not disclosed to them? The Solicitor-General in the course of his argument sought to shew that the appeal was not a matter inter partes by contending that, if, after the letter or notice of appeal had been delivered to the Board, the Board came to the conclusion that the appeal was well founded, the Board could allow the appeal without giving the local authority who made the order any notice or opportunity of being heard; but I think that after discussion he did not persist in this argument. It seems to me that this practical admission of the right under such circumstances of the local authority to be heard is very strong to shew that the appeal is a lis inter partes.

Next, I will consider what is the character of the duty which has to be performed by the Local Government Board. It was admitted in terms by the Solicitor-General that the Local Government Board is deciding a matter in which they have to exhibit a judicial temper, in which they, to use his own words, are not at liberty to act contrary to the principles of justice. Of course, an Act of Parliament may be so worded as expressly to authorize a procedure inconsistent with the principles of justice recognized by the common law of England. Parliament is

(1) [1911] A. C. 179. (2) [1911] 2 I. R. 331.
(3) [1911] A. C. at p. 182.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Vaughan Williams L.J.

omnipotent. Rules, however, made under statutory authority, although express, may, in my opinion, be inoperative because they are ultra vires, or inconsistent with the principles on which English law is based. At all events, when rules are silent, such a rule, inconsistent with the principles on which the common law is based, cannot be implied. I do not find in the Act of 1909 any provision dealing with the disclosure or the non-disclosure of reports dealing with the facts or law laid before the Local Government Board by the inspector who presided at the public meeting or any other officer exercising a non-judicial function for the purpose of consideration by the Local Government Board in arriving at their decision. Nor do I find anything of the sort in the Rules determined under s. 39. The Act and Rules, except for provisions (*a*) and (*b*), are silent as to procedure. No one has argued that, where the Rules are silent, the procedure to be adopted on an appeal to the Local Government Board must be that of a common law Court. What was argued was, that on an appeal to the Local Government Board, at all events when not sanctioned by Act or rule expressly, or by constructive implication, the procedure must not be contrary to natural justice. There is certainly nothing express in the Act or Rules to authorize the non-disclosure to the appellant or respondent who asks for production of documents submitted to the Local Government Board for consideration when making their decision, and taken into consideration by them. It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based. In my opinion the non-production of these reports is contrary to the principles of natural justice on which English law is based. The fact that the Housing, Town Planning, &c. Act, 1909, is an Act passed to carry out a most useful reform, avoiding expensive litigation in certain local matters which in the interests of the public ought to be disposed of promptly by transferring jurisdiction from the Law Courts and vesting it in the Local Government Board (a department of the State), does not, in my opinion, justify a construction of the Act which, by mere and unnecessary implication, authorizes a manifest

departure from the principles upon which the English common law is based. It was said in argument that there was nothing in the affidavit on which the appellant obtained the rule nisi, or on which he relied in argument, to shew that there was anything in the documents not disclosed which told against the appellant's case in fact or in law; but surely it was for those who had to shew cause to lay before the Court of King's Bench proof that the documents presented to the Board, the contents of which were not disclosed to the appellant, were innocent or were immaterial. I wish to say here, as part of my judgment, that as a fact in this case the Local Government Board, through their secretary, Sir Horace Monro, thought fit to set forth the facts of the case in an affidavit. They may or may not—I have not to decide that—have been under an obligation to set forth those facts; but, having purported to set forth those facts, in my opinion the affidavit should have stated them fully, and omitted nothing.

The non-production of these documents was justified by the Local Government Board on the ground that reports, whether of fact or law, made by officers of the Board, were, according to a well-established practice of the Board, both under this Act and prior Acts, treated as confidential. I invited the Solicitor-General to produce these documents for inspection by the Court, but he (I daresay quite properly) refused; but in my opinion the reports of the presiding inspector ought not to have been treated as confidential.

It appears from the report of the decision of the Divisional Court in the *Law Reports* (1) that one of the points made by the appellant's counsel was that the appellant's appeal was not in fact heard by the Local Government Board or any qualified deputy at all, but only by an officer not qualified to perform any judicial function or to arrive at any decision relating to the appeal either in law or in fact. The qualification, it was contended, is defined by the first paragraph in s. 5 of the Local Government Board Act, 1871, "An Act for constituting a Local Government Board and vesting therein certain functions of the Secretary of State and Privy Council concerning the Public

(1) [1913] 1 K. B. 463.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Vaughan Williams L.J.

Health and Local Government, together with the powers and duties of the Poor Law Board." Sect. 5 of that Act runs thus: "The Local Government Board may adopt an official seal, and describe themselves generally by the style and title of 'The Local Government Board,' and, save as hereinafter provided, any act to be done or instrument to be executed by or on behalf of the Local Government Board may be done or executed in the name of that Board by the President or by any member of the Local Government Board, or by a secretary or assistant secretary, if such secretary or assistant secretary is authorised to do or execute the same by any general order of the Local Government Board. A rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board, and signed by the President or one of the ex-officio members of the Board, and countersigned by a secretary or assistant secretary; and the production of such prima facie evidence of any of the said rules, orders, or regulations as is required by the Documentary Evidence Act, 1868, with respect to the rules, orders, or regulations of the Poor Law Board, shall, until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made." I wish to say here that it was common ground in this case, that notwithstanding the words in that section as to the validity of the order, it is not disputed that the order may be held to be invalid if in fact the order contains provisions which are inconsistent with the principles of natural justice. This, it seems to me, would be a perfectly good point provided there was proof or any evidence of it in fact, but the difficulty is to find either proof or evidence, either that the appellant's appeal was not heard by the Local Government Board at all, or that the decision was arrived at by an officer not qualified to arrive at conclusions or give a decision. The affidavit of Sir Horace Monro, the Permanent Secretary of the Local Government Board, states in paragraph 20 that: "After careful and impartial consideration of the facts and the evidence given at the said inquiry and the report of their inspector, an order was made on the 26th February, 1912, under the seal of the Board, signed by the President, and countersigned by an assistant

secretary, confirming the said refusal of the borough council to determine the said closing order." The affidavit does not state by whom the careful and impartial consideration of the facts and the evidence given at the said inquiry was made. I think that the affidavit, if the Permanent Secretary thought fit to make it, should have stated this. It has been argued that this provision only means that in form the decision has to be the decision of the Local Government Board, and that it must be presumed that the act of consideration and decision was "done" by some officer authorized in accordance with s. 5 of the Act of 1871. I think that in substance, and not merely in form, the decision must be an act done by the Local Government Board in accordance with s. 5 of the Act of 1871. It is true that the production of a rule, order, or regulation, signed by the President and countersigned by a secretary or assistant secretary, and the production of such prima facie evidence of any of the said rules, orders, or regulations, as is required by the Documentary Evidence Act, 1868, with respect to the rules, orders, or regulations of the Poor Law Board, shall, until the contrary is shewn, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made. I am not sure that there is not an obligation on the Local Government Board when shewing cause to make it plain that in fact the decision was arrived at by an act of decision done by a member of the Local Government Board or some other duly qualified person or officer. The affidavit of Sir Horace Monro does not express this, and I am not sure that one would not be justified in saying that the deponent avoids expressing it. I doubt if it is a case which is properly met by any legal presumption that the Board in fact complied with a statutory obligation. The obvious reason why the appellant wishes to know who in fact decided, or was deputed to decide, the matters arising on the appeal was to discover whether the person deciding had jurisdiction.

Now the question arises whether the Court has a duty, or is entitled, to require the Board to inform the Court who was the person who in fact made the careful and impartial consideration of the facts and the evidence given at the inquiry and what were the contents of the report of the inspector, which report may or

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Vaughan Williams L.J.

may not have included statements of fact and evidence not given at the public inquiry. It is admitted that Inspector Leonard had no judicial function entrusted to him. The appeal is not, as I have already stated, in my opinion, a mere "lis" inter partes. The public have an interest that the proceedings on appeal shall be properly conducted, and I am by no means sure that, having regard to the omission in paragraph 20 of the affidavit of the Permanent Secretary to state by whom the "careful and impartial consideration" of the facts and evidence given at the said inquiry and the report of their inspector was made, that this Court would not have a right and a duty to call upon those shewing cause to supplement the affidavit by stating by whom in fact the "careful and impartial consideration" was given. It is essential to the confidence of the public in the administration of justice by a department that no relevant information should be withheld by the Board. The omission to state who it was gave the "careful and impartial consideration" gives rise to an objection in the nature of a demurrer.

I will now say a word or two on the point made by the appellant's counsel that he was never allowed to know his judge's name, or to see him face to face and address him viva voce. This point was undoubtedly strenuously argued by Mr. Upjohn on behalf of the appellant. I think that the point fails so far as it asserts the right to see the judge face to face or to address him viva voce; but I think that the appellant is entitled, after all the documentary evidence and reports have been received by the Local Government Board, to have placed before the personal judge who is going to pronounce a decision a written argument, and in that sense is entitled to a "hearing" before the decision is given; but as I have already said he cannot do this effectively until he has had the opportunity of seeing and considering the reports and documents which the judge has before him to guide him in coming to a decision. It must never be forgotten that the presiding inspector cannot exercise any judicial function regarding law or fact. His function as presiding at a public inquiry is simply that of a reporter reporting evidence and arguments. This function was effectively carried out in the present case by means of a transcript of the shorthand note of a shorthand

writer appointed by the consent of the presiding inspector and those representing the Hampstead Borough Council and the appellant respectively, an arrangement which obviated many of the difficulties which must arise when the presiding inspector can only write longhand and there is no shorthand writer appointed. It was admitted, however, that the arrangement to have the note of the proceedings at the public inquiry taken by an agreed shorthand writer is not generally adopted, but that the report of such proceedings is not infrequently taken in longhand by the presiding inspector himself.

I do not think reference to legislation which authorizes proceedings which do not involve a lis inter partes ought to affect the construction of an Act which deals with procedure in cases which do involve litigation inter partes. Nor do I think that the practice of the Admiralty Division as to the advice of Trinity Brethren on seamanship assists the Court to draw conclusions as to the construction of this statute. The analogy is farfetched.

With regard to cases on foreign judgments in which the question has been whether there has been procedure contrary to natural justice of such a character as to prevent the foreign judgment being enforced in England, I will assume that such cases are not narrowed down to the question of the assumption of jurisdiction over absent defendants; but even on this assumption I cannot see how it affects the question which we have to decide, that is to say, the question whether the procedure on appeal before the Local Government Board has been so contrary to natural justice as that the judgment ought to be quashed and the appeal sent back to the Board to be determined in the manner provided by law, that is, the English common law.

With regard to the practice of the Court of Criminal Appeal, I cannot think that the practice of the Court of Criminal Appeal to receive information from the judge who tried the case is the affirmation by the Court of Criminal Appeal of any principle which involves the proposition that it is not contrary to natural justice to withhold from a litigant reports of law or fact which are taken into consideration by those who in fact perform the judicial office and arrive at the decision of the appeal. The

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Vaughan Williams L.J.

history of the legislation in respect to criminal appeals shews how the right of appeal has gradually been developed. Originally there was no appeal but to the King's mercy. Then came the Crown Cases Act, 1848, which allowed the judge, if he thought fit, to state a case and reserve a point of law. In my opinion the Criminal Appeal Act is in history a progressive extension of the Crown Cases Act and adopts, apparently, in substance much of the practice which existed when the form of appeal was for a judge to state a case, in which case the judge was necessarily to determine himself the facts to be stated in the case. The case itself, of course, had to be delivered to the convicted man and his advisers, but such a case did not set forth the evidence upon which the facts found by the judge were based, and the question to be decided was only a question of law. Under the present system it is not only questions of law which can be raised. I think, however, that one finds traces of the procedure throughout the appeal administration in the new Act, and I have come to the conclusion that there is nothing in the Criminal Appeal Act, 1907, or the Rules thereunder, which in any way interferes with the common law right of the appellant in this case to have the whole of the evidence and reports, taken into consideration by those who decide the appeal, disclosed to him, or the appellant's right to be heard, it may be by a written argument, after the report or reports of the inspector. I think that the appellant had a right to have these disclosed to him and that the refusal cannot be justified on the ground that the reports of the inspector are by the practice of the Local Government Board treated as confidential.

I have come to the conclusion that the non-disclosure of these documents, when the disclosure was asked for, is itself inconsistent with natural justice. In arriving at this conclusion I have, as indeed was suggested by the Solicitor-General, dealt only with the non-production of the inspector's report after the second inquiry as the strongest instance in support of the claim for a certiorari. The Solicitor-General in terms admitted that the duty of the Local Government Board in this case involved doing nothing inconsistent with natural justice. Although in my judgment I have dealt only with the non-production of the

report after the second inquiry, I think it right to call attention to a statement appearing in a letter written by the assistant secretary, W. T. Jerred, of the Local Government Board on January 8, 1912, answering a large number of observations and objections to the appeal based on the procedure of the Local Government Board in respect of the earlier appeals. That letter contains the following passage: "In order that there may be no misapprehension on the subject, the Board think it right to state that in dealing with the matter they will take into consideration the appeals addressed to them on the 19th October and on the 15th November, as well as all the circumstances of the case, and that they will give their decision accordingly. In the circumstances the Board will be willing to consider any further statement which may be submitted to them by or on behalf of the appellant with reference to the subject-matter of his appeal. Any such statement should be made in writing and should be addressed to the Board within seven days from the date of this letter." I do not see how the appellant could make a statement such as he is here invited to make when he had not seen the report made on the first inquiry any more than he had seen the report of the second inquiry.

Sir Horace Monro, the Permanent Secretary of the Local Government Board, makes in paragraph 2 of his affidavit of July 12, 1912, the following statement:—"I have read the affidavit of William Arlidge sworn herein on the 15th day of April, 1912, and I say that the order made by the Local Government Board dated the 26th day of February, 1912, and therein referred to was made after full and careful consideration of the reports made to the Board by their inspector, Edward Leonard, and the evidence and documents which accompanied those reports. A large number of observations and objections put forward on Mr. Arlidge's behalf by his solicitors and hereinafter referred to were also considered, and before a final decision was come to, Mr. Arlidge was invited by letter dated the 8th day of January, 1912, and addressed to his solicitors to place before the Board for their consideration any further statement which he might desire them to consider with reference to the subject-matter of his appeal before the making of the order." These

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

facts which I have stated seem to be relevant to the matters under discussion.

I think that the appeal should be allowed and that the order in question of February 26, 1912, should be quashed and sent back to the Local Government Board to be determined in the manner provided by law.

BUCKLEY L.J. read the following judgment:—With the importance of this case upon its facts I am not impressed at all, but its importance upon the general question which it raises can scarcely be overestimated. It is increasingly common by statute to empower Government departments to decide questions affecting rights of property. It is of the first importance that their proceedings should be so conducted as to command the confidence of the public and that the principles applicable in their conduct should be well understood.

There are here two matters with which I have no concern, namely, (1.) whether this house is fit for human habitation, and (2.) whether Mr. Arlidge is a reasonable person. The whole question for determination is whether upon the appeal of the latter the Local Government Board have duly discharged the duty of deciding the former.

Upon the first appeal by Mr. Arlidge there came into existence three documents, namely, (1.) the representation of the borough medical officer (Sir Horace Monro's affidavit, paragraph 4). This may or may not have contained statements of fact. It is said that it did not. This is probable. At any rate I attach no importance to the document, and I shall say nothing further about it. (2.) The inspector's report, dated May 27, 1911, of the result of the first public local inquiry; (3.) the inspector's report, dated June 5, relating to his inspection of the premises. Upon Mr. Arlidge's second appeal there came into existence (4.) the inspector's report, dated December 13, 1911, of the second public inquiry. This contained not only his report of the result of the inquiry but also his report of his second inspection (Mr. Leonard's affidavit, paragraph 7). All these documents were before the Board when they made their order of February 26, 1912. Mr. Arlidge has never seen any one of them. He has asked to see

them and the Board have refused. A principal question—in fact I think the principal question—upon this appeal is whether this is right. There are in the Act mentioned three cases in which the local authority is empowered to act, namely, (1.) s. 17, sub-s. 2, they may on the representation of the medical officer of health make a closing order if certain things appear to them. This is a summary proceeding without hearing any one. (2.) Sect. 17, sub-s. 6, they may determine the closing order if they are satisfied of something. In this case they may be acting on an application of the owner. There is no provision as to whether they are to hear him or not. (3.) Sect. 18, sub-s. 1, they may take into consideration the question of demolition, and in such case the Act provides that the owner "shall be entitled to be heard." There are again three cases in which there may be an appeal to the Local Government Board, namely, s. 17, sub-s. 3, from the closing order; s. 17, sub-s. 6, from the refusal of the local authority to determine the closing order; and s. 18, sub-s. 4, on the question of a demolition order. There is in no case any provision as to the procedure the Board are to follow in hearing the appeal. But s. 39, sub-s. 1, provides that the Board may by rules determine the procedure of any appeal "including costs." The addition of these words "including costs" (words which it is difficult to fit appropriately into the sentence) raises some difficulty. But I think it clear that all the section authorizes is the making of rules to determine procedure. Such rules must be rules consistent with natural justice. For instance, the Board could not make a rule, (1.) that neither the appellant nor the local authority should be heard orally or in writing or in any manner whatsoever; nor (2.) that each should be heard but only in the absence of the other; nor (3.) that neither should be informed of the facts alleged or arguments advanced by the other. These would each and all be contrary to natural justice. I think, and will assume, that (4.) a rule could be made that each should be heard originally, not orally, but in writing; but (5.) I greatly doubt whether a rule would be valid that a party who having submitted his case in writing desired to be heard orally should not be so heard. In fact the rules in this case do not raise any of the above points. For the present they do not go

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Buckley L.J.

beyond rules that the statements of the parties shall be in writing. What is to ensue thereupon is so far as the rules are concerned left open.

We have heard much discussion as to whether the local authority is upon an appeal in the position of a party litigant. In a sense I think it is not. It is the authority from which the appeal is brought. But its position is such as that it can be called upon to make a counter statement (r. 5), and an order can be made that it should either pay or receive costs (r. 8), and it is, I think, in a position to ask for a special case under s. 39, sub-s. 1 (*a*). For all purposes material to the present case it is not to be distinguished from a party litigant. It is a person to whom it is open to allege and prove facts and to succeed or fail in displacing the facts alleged by the appellant. Under these circumstances natural justice, I think, requires that the appellant should know the facts which the local authority allege, and be placed in a position in which he may meet them and displace them if he can. He ought to have a copy of any statement which the local authority make to the Local Government Board, and all representations by the local authority to the Local Government Board ought to be disclosed to him.

The person who is to decide under the Act must be some person within 34 & 35 Vict. c. 70, s. 5. Briefly, he is a person acting on behalf of the Board and being any official down to and including an assistant secretary, if a proper order is made within that section authorizing him. It is competent to the Board, and under some circumstances they are bound (see s. 39, sub-s. 1 (*b*) of the Act of 1909), to hold a "public local inquiry." This is held before an inspector. The inspector is not within the class of persons who can decide anything. His duty, in my opinion, is to hear the examination and cross-examination of the witnesses and to record it and transmit it to the Board with whom it lies to determine the result. He may also, I think, and certainly it has long been the custom that he should, make a report. This, I take it, will assume the form of a critical examination of the evidence adduced before him and an expression of his opinion upon the questions of fact as appearing upon it. Upon this report three questions arise: (1.) Whether the report made upon

a public local inquiry is not a public document. It would require much argument to convince me that when a public local inquiry is ordered the result as contained in the report should be withheld from the public. The very purpose is that the inquiry should be public, and how can that be when the result is private? The report of the inspector is in no sense a judgment. But it is a most material step taken by an officer of the tribunal in the proceedings which will lead to the ultimate decision. In the case of a public trial the publicity not of the proceedings only but of the judgment in particular is one of the most important safeguards of purity of administration. The judge must not only give his judgment in public but must give his reasons for his judgment, and that not so much for the assistance of the tribunal which may have to review him on appeal (for in the Court of ultimate appeal the same rule prevails), but with a view to rendering impossible a judgment arbitrary or capricious. Similar considerations apply to the views or reasons expressed by an inspector in his report on a public local inquiry. Local inquiries were common before this Act. The word "public" here, I understand, is new. In that word lies much, I think, to assist in determining the present question. Then (2.), and this is a smaller question, is the report a document whose contents Mr. Arlidge is entitled to know when he is a member of the public whose property is affected by the report, and (3.), a still smaller question, is it a document whose contents Mr. Arlidge is entitled to know as an appellant when the document is part of the materials upon which the Board are going to determine on his appeal a question affecting his property? It is this last question which here arises for decision. I answer this question in the affirmative. The inspector by his report is communicating to the Board his views and his reasons for them. Mr. Arlidge ought in my opinion to know those views and those reasons and have an opportunity of combating them before the person whose duty it is to decide. Take the case of a judge sitting at nisi prius with a jury in a matter in which no questions of law arise. It is the judge's duty to sum up the case to the jury and it is for the jury to decide the question of fact. Could the judge order the parties and their

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte*.

Buckley L.J.

counsel to leave the Court during the summing up? For the purpose of the illustration, the inspector is the judge at nisi prius before whom the evidence is taken, the Local Government Board are the jury who are to decide the fact, and the inspector's report is the summing up. The analogy is an imperfect one, for the summing up comes after counsel have concluded their addresses to the jury and at a time when counsel have no right to intervene, unless it be to call the judge's attention to some inadvertent error into which he may have fallen or to ask him to direct the jury upon some matter which he has overlooked. But the present case, I think, is the stronger in that the report is made at the time when the parties have not yet approached the deciding officer with argument and are entitled to press their case before him with knowledge of all the materials which he has to consider.

The inspector made other reports to which different considerations apply, namely, the reports of his two inspections. Those reports were not reports of the evidence taken before him and its result, but were the inspector's original statements of facts as he found them to be upon his inspection of the premises. This is original matter by way of evidence given or statement of fact made by an authorized person to the authority (the deciding officer) who is to decide. Natural justice requires that the mind of the deciding officer shall not be affected by original statements of fact not communicated to the person to be affected by the decision and upon which he has never been heard. In my opinion the reports of the inspector ought to be disclosed to the appellant, and he ought to have an opportunity if he thinks fit to deal with them. It is not consistent with natural justice that the mind of the tribunal should be swayed by statements which are not communicated to the appellant, and with which he is given no opportunity to deal, and which are either (*a*) a summary of, or an expression of, the result of the evidence given before the inspector, or (*b*) statements of fact made by the inspector as the result of his inspection. An order cannot justly be made against any man upon evidence not disclosed to him so that he may rebut it if he can.

The inspector did not confine himself to taking evidence, but

also heard arguments, and from pp. 5, 6 and 7 of the shorthand notes I think he was of opinion, and in substance stated, that it was for him to hear argument and that now was the opportunity of advancing argument, inferring that there would be no subsequent opportunity. The proposition here involved is (upon the assumption that oral argument ought to be entertained) that argument is to be made before a person who is not to decide, and reported by him to the person who is to decide. As it happens there is in this case a full shorthand note, but that would not be so in every case or I suppose in most cases. At most there would be a note of the inspector of the nature of the arguments adduced before him. But, whether there was a shorthand note or not, it is quite inconsistent with all our ideas of argument that a case should be argued before one man and decided by another. If the appellant was entitled to be heard orally it is no answer to him to say that he has been heard before the inspector.

The Board have no doubt a number of these cases with which they have to deal. I think it quite unnecessary to lay down, and at present I am not of opinion, that they are bound before determining appeals of this kind to hear the parties orally. In a vast number of cases it would not be necessary, and a determination to that effect would vastly increase the expense. The appellant had, I think, a sufficient means of stating his case in writing. By the letter of January 8, 1912, he was offered the opportunity of making a further statement. But it is obvious that an opportunity of so doing was of little use to him when there were not disclosed to him the materials upon which the Board were going to act. By his letter of October 18, 1912, he asked for Mr. Leonard's reports, and on October 21 the Board refused to communicate them to him. In adjudicating upon the matter the Board took into consideration the reports which had so been refused him: see Sir Horace Monro's affidavit, paragraphs 2 and 20. In my judgment, the Board were wrong in refusing to disclose to the appellant those documents, and upon this ground I think that the appeal succeeds and the order must be quashed.

Upon the question of the appellant's right to an oral hearing

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Buckley L.J.

I will only add this. I am not satisfied that an appellant who having lodged his written statement asks to be heard orally can be refused the opportunity of arguing his case, not before the inspector, but before the officer of the Board who alone is competent to decide and is going to decide the case. I will add that in my judgment it would as matter of public policy be very inexpedient for a department of the Government in whom powers such as these are vested by statute to refuse an appellant an oral hearing if he requests it. It is not expedient that a party should be sent away with a grievance. It is desirable that the decision of a Government department equally with that of a Court of justice should be arrived at and pronounced in full publicity and in such manner as to satisfy the public conscience that the case has been heard and a decision pronounced after full opportunity given to the party to make and sustain his case.

I think that the appeal succeeds.

HAMILTON L.J. read the following judgment:—I regret that I cannot concur. The appellant's points are, first, that he was never allowed to know his judge's name, to see him face to face, or to address him viva voce; and, second, that before deciding the appeal his judge saw, what he himself was never allowed to see, certain material documents, particularly the reports made by Inspector Leonard to the Local Government Board. In the Divisional Court I think his case was argued more generally, on the one broad ground that he had not been "heard" because he had not been given an oral reply on all the materials which the deciding official had before him when he decided the appeal. It is only before us that the argument has been definitely separated into two heads, as stated above.

By the Housing, Town Planning, &c. Act, 1909, the Local Government Board is made the final judge of appeals under it from the local authority. It is thus substituted for Quarter Sessions, which was the Court of final appeal under the Act of 1890, but the procedure to be adopted is to be such as the Local Government Board shall decide, subject only to two expressed proceedings, a public local inquiry and the statement of a case for the opinion of the High Court, and to one provision which is admittedly

implied, namely, that the procedure to be adopted shall not be "contrary to natural justice." It has not been argued before us that no procedure, though it is in fact adopted by the Local Government Board, is valid unless it is expressed in formal rules, nor that where the published rules are silent the procedure to be adopted must be that of a common law Court, the unwritten practice of the Board notwithstanding. We have not been asked to quash the whole proceedings merely because some of the steps are not specifically prescribed by the published Rules. I think the appellant was right in not so contending, because such parts of the procedure actually followed as are not expressed in the Rules may fairly be implied from them, and the proceedings stand or fall as a whole and on wider grounds.

Formally the decision is to be that of the Local Government Board, and in this case it is so expressed and is correct in form. Practically I will assume that it is the decision of some particular official, duly deputed for the purpose. The appellant asks who he was. He complains that he was never told. What does this matter? Curiosity apart, there seem to be only two reasons why an appellant should seek, as it is put, "to know his judge." One is to hold him up to public criticism; this may be quite right but it is none of our business. The other is in order that he may be able to shape his arguments in accordance with the deciding official's personal equation. I think, therefore, that this claim is only part of the general claim for a "hearing" coram judice, for a viva voce appeal, for the right to stand in person before the judgment seat. In my opinion, the question whether the deciding officer "hears" the appellant audibly addressing him or "hears" him only through the medium of his written statements, is in a matter of this kind one of pure procedure. The practice of the High Court, past and present, as to hearing motions on affidavits and taking evidence before special examiners or the examiners of the Court, shews that there is nothing universally essential in the judge's seeing and hearing the witnesses for himself. One must remember what the subject-matter of these appeals is. Under this jurisdiction only two questions can come before the Local Government Board on appeal, first, "on such and such a day was the appellant's house fit or unfit for human

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

habitation?" second, "since the closing order was made, has it or has it not become or been made fit?" This is not the first occasion on which such an objection as the appellant's might have been taken. There is an analogous case. The Public Health Act, 1875, by s. 247, sub-s. 8, permits any person, who is aggrieved by an auditor's disallowance of an item during the audit of the accounts of an urban authority, not being a council of a borough, to proceed either by certiorari to get the disallowance removed and quashed or to appeal against it to the Local Government Board. The matter may readily involve pecuniary interests as grave as those involved in the present case. The practice of the Local Government Board has always been to do, what its predecessor the Poor Law Board did, namely, to dispose of such an appeal simply by correspondence between the aggrieved person, the auditor, and the Board, supplemented occasionally by an inquiry into facts, which is held by an inspector (Lumley's Public Health Act, 7th ed., p. 557). In *Attorney-General* v. *Merthyr Tydvil Union* (1) it became necessary to argue before this Court, on the one side and on the other, whether in the particular case the aggrieved person ought to have resorted to an appeal to the Board instead of taking the course which was taken. It is scarcely possible that the practice stated in so standard a work as Lumley's Public Health Act can have escaped the notice both of counsel and of the Court, yet neither from the Bench nor at the Bar was any suggestion made that the parties aggrieved were right in not appealing to the Local Government Board because the Board's "hearing" by correspondence was a procedure both inconvenient and contrary to natural justice. The fact is that for such appeals as are here in question one scheme of procedure may be better than the other, but both the oral and the written scheme remain rival procedures still and the Act leaves the Board free to elect between them. The provision that a public local inquiry must be held in a certain event suggests that the Legislature contemplated that the other proceedings might be private. It is said that a written argument is an illusory thing, that there is no eloquence or at least no persuasion but in

(1) [1900] 1 Ch. 516.

speech. Parliament should know something about that, and it has left the matter to the Board. I find the contention bewildering. Are reasoning and writing mutually exclusive processes? The appellant desires to enjoy what Mr. Upjohn felicitously calls "the bound and rebound of ideas and arguments between the Bench and the Bar." This invests with authority a practice (or should I say a foible) of judges, which I had believed to be pardonable and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice. It is said again that the appellant is entitled to a reply. Apart from the separate question of his right to see all the materials eventually considered by the deciding officer, I think this is only procedure again. Even in the various Divisions of the High Court practice varies both with regard to the number of speeches allowed to counsel and to the stages at which they are made, and there is also a difference between High Court and county court practice with regard to the defendant's address to the Court. The bare question of a concluding address by the appellant seems to me to be only a question of the cursus curiæ.

The real and the only difficult question before us is this. Before he gave his decision the officer of the Board saw what the appellant never saw, the inspector's reports. The officer considered them; can his decision stand? I dismiss the report of the local authority's medical officer of health (Sir H. Monro's affidavit, par. 4). It was clearly not relied upon in the Court below when the rule nisi was argued, and the appellant cannot mend his hand with it on the appeal. If, as we are told, it was a mere preliminary form, the point would in any case have been without substance and immaterial. On the other hand I assume on the evidence that the officer considered Inspector Leonard's report of the first inquiry as well as of the second, and, failing production of them, that, in addition to reporting the evidence, they stated his opinion on the case, his impression of the witnesses, and the observations which he made on his visits to the premises. Prima facie, if a deciding officer considers documents containing material statements and not mere matters of form or repetitions of what is already substantially and fully known to the appellant, he should give the appellant the

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

opportunity of dealing with them before he decides the appeal. Had this been done, the Board's invitation to the appellant, dated January 8, 1912, would have been a real and not a merely illusory proceeding.

The Board's case, however, is that in treating the inspector's reports as confidential it followed an old and well-known practice. I make no doubt that it did so for reasons which it honestly deemed sufficient, some of which it is easy to surmise and to appreciate. As the inspector does not perform any judicial function in reporting, the privilege which he could claim for his statements, if sued for libel, would be a qualified privilege only and not absolute. If the appellant, and I suppose the local authority, are ultimately to see it, the inspector might hesitate to express himself in his report as frankly as might be desirable for the guidance of the Board. But in addition to practice the Board relies on the language of the statute as warranting this practice when truly construed. Accordingly two questions arise, what is the true construction of the statutes, and, if the statute itself does not authorize the practice, is it, as part of the procedure adopted by the Board, so "contrary to natural justice" as to vitiate the decision? On both questions some reference to the position before 1909 may be useful.

Though inquiries in connection with judicial proceedings of more or less legal character were common enough before 1909, the Legislature had not adopted any settled rule with regard to the reports. Sometimes it directed communication of the report to certain persons interested; sometimes it contemplated publication without expressly directing it; sometimes the Act was silent on the subject altogether. I have not found any instance in which the Legislature has directed in terms that the report should not be disclosed at all. The Regulation of Railways Act, 1871, by s. 7, sub-s. 2, directs that inquiries under that Act shall be held "in open court," and by s. 7, sub-s. 4, that the Board of Trade "shall cause every such report to be made public in such manner as they think expedient." The Merchant Shipping Act, 1894, consolidating earlier legislation, and the Shipping Casualties Rules made thereunder, which by s. 479 have the force of statute, provided that the Wreck Commissioner or the magistrate,

holding a formal investigation into a shipping casualty, should make a report of the proceedings and decision to the Board of Trade, and then r. 18 provided that, when the certificate of a master, mate, or engineer has been cancelled or suspended, the Board of Trade shall, on application by any party to the proceedings, give him a copy of the report, while r. 20 (*b*) contemplates that the report will as a matter of course be "issued in print in London by the Board of Trade," in this no doubt recognizing its existing practice. On the other hand, when a Receiver of Wreck takes an examination of witnesses on oath under s. 517, sub-s. 2, and transmits it to the Board of Trade, he is directed to send a copy to Lloyds' for publication there, "and these" says Mr. Murton (Wreck Inquiries, ed. 1884, p. 38) "are the only depositions on wrecks made public documents." The Workmen's Compensation Act, 1906, Sched. II., r. 15, enabled an arbitrator to refer controverted questions as to the applicant's actual condition to a medical referee for inquiry and report, but the Act makes no provision as to the use which is to be made of the report. Regulation 28, made under the Act, directs that it is to be sent to the Registrar, and it is to be in a form which, as a form, is adapted to communication only to him as an officer of the County Court. The decisions on the Workmen's Compensation Act carry the matter no further. The Licensing Consolidation Act, 1910, s. 19, and r. 16 made thereunder, provided that parties interested should be entitled to copies of the report made by licensing justices to the compensation authority on payment of a fee. The Criminal Appeal Act, 1907, by s. 8 requires that the trial judge shall furnish a report to the Court of Criminal Appeal upon the case which had been tried before him, for use upon the hearing of the appeal from him to the Court of Criminal Appeal, and by No. 15 (*b*) of the Rules, which have statutory force, it is in the discretion of the Court to grant or refuse communication of his report to other persons than to the Court itself. By s. 9 (*d*) the Act further gave power to the Court of Criminal Appeal to depute to special commissioners inquiries involving prolonged examination of accounts, and here again the part to be taken in such inquiry by the appellant and even

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

his presence at it are, by r. 41, in the Court's discretion, as is also the communication to him of the special commissioner's report, when made. Further, apart from statute or statutory rules a decision of this Court has settled the rule with regard to the Trinity Brethren, who sit as assessors with the judges of the Admiralty Division. The appellant was held not to be entitled to know the answers given by them to the judge's questions: *The Banshee* (1); though in practice the judge very frequently saw fit to mention the gist of them in pronouncing his judgment without being bound to do so. It is true that in none of these cases is there a close analogy to the present case, but I do not think that important. The analogies are imperfect, but all analogies are. Whether a report be about matter of fact or matter of opinion, whether, if opinion, it is expert opinion or lay, whether the subject involved is personal liberty or real property, whether the maker or the recipient of a report is or is not a judge, one thing is clear, that every one of these cases is a case of a judicial proceeding. Two conclusions may I think be drawn from them. It cannot be assumed that the Legislature means all such reports to be communicated to those interested, where it does not say the contrary; indeed, if anything, its practice is the other way, namely, to specify how and to whom such reports are to be communicated, when they are intended to be communicated at all. Further, neither in the view of the Legislature, nor in that of the Court of Criminal Appeal, is it, per se, contrary to natural justice and necessarily a fatal blot on judicial proceedings to withhold from an appellant cognizance of a statement made to the appellate tribunal only.

In requiring that in a certain event the Local Government Board should hold a public local inquiry the Legislature was requiring resort to a proceeding quite well known and in common use, to which was incident the Board's practice to treat the reports made thereon as confidential. The practice is stated in Lumley's Public Health Act (7th ed., p. 636), and it was commented on, unfavourably but without effect, by Farwell J. in *Attorney-General* v. *Nottingham.* (2) It was enacted by s. 76 of the Act of 1909 that the Act should be construed as one with the

(1) 56 L. T. 725. (2) 2 L. G. R. at p. 701.

Act of 1890, an Act under which this practice had prevailed. I think it is a sound inference, to be drawn as a matter of construction, that the Legislature, aware, as I take it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry, which it prescribed, should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential.

An argument has been presented to us on the word "public." A local inquiry was well known; a public local inquiry is admittedly a new expression as such, though the Merchant Shipping Act, 1894, s. 466, sub-s. 12, required formal investigations into shipping casualties to be held in a "public building," and the Regulation of Railways Act, 1871, provided that proceedings under it should be held "in open court." The idea of publicity in connection with a local inquiry was therefore not new, even if the adjective "public" was. I do not see why the publicity of the inquiry should of itself involve the publication of the report, though the decision, where there is one, no doubt must be published more or less ex vi termini. The analogy of public documents does not advance the argument. "Public documents" are well known in the law of evidence, but the expression there means documents, which may be proved without production of the originals, or else documents which, for reasons of State, are not to be produced and proved at all. I think that the natural import of the word "public," as qualifying the local inquiry, is to shew that the public ought to be admitted to it as of right, because of its interest in such matters, although it is true that the subject-matter of the inquiry is private property, and the decision directly affects only private rights. As a matter of construction I think that the word "public," limited, as it is, to the local inquiry, negatives by implication the publicity of any of the later machinery. Such a conclusion is in harmony with the previous practice of legislation, so far as it went, since that was to provide for publication of reports expressly, where publication was intended, and also with the structure of the Act of 1909 itself. The Local Government Board was left to frame its own procedure. As must have been foreseen, it followed its

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

own precedents, and made no provision for communicating this report under its Rules, such as was made, in greater or less measure, in the Rules under the Merchant Shipping Act, 1894, and the Licensing Consolidation Act, 1910, carrying out the provisions of those statutes. Furthermore, in committing the decisions of these appeals to a composite administrative Board, which must act by officers and cannot be ubiquitous, the Legislature departed slightly but significantly from the language of prior enactments. The Local Government Board now "holds the inquiry" and not merely "causes it to be held." Being impersonal and corporate it inquires by one organ and decides by another. The knowledge of the deciding officer of the result of the inquiring officer's performance of his functions may well be an internal matter, never communicated to any stranger. No one contends that it is any part of the inspector's duty to decide anything. In this, as in other Government departments, an inspector, whether regularly or specially employed, merely inquires and reports. His conclusions of fact, if he thinks fit to submit any, bind no one; they are simply stated for the information of the superior officials of the department. From beginning to end the appeal is one continuous departmental exercise of corporate functions. It nowhere involves the communication to the appellant of internal reports, any more than it involves the exposition of the deciding officer's mental processes in arriving at his decision. I have come to the conclusion that the practice of treating the report as confidential has the authority of the Act of 1909. There is nothing in prior legislation to negative it; there is good ground in the adoption of the existing machinery of local inquiries for upholding it: there is support for this in the language of the enactment, and it is sufficient in the absence of anything whatever in that language to the contrary.

So much for the question of construction, but, if I am wrong in this, still, as the Act and Rules clearly cannot be construed to require in terms what the appellant contends for, how does the matter stand at common law in view of the decisions of the Courts? Can his contention be established by implication? What standard of natural justice has been recognized in judicial

proceedings? Does it require the procedure now contended for?

But little guidance is to be got from cases of writs of certiorari to inferior Courts. In *Ex parte Evans* (1) Lord Denman C.J. held that the control which quarter sessions, like other judicial bodies, ought to exercise over its own procedure extended to making a rule giving the Bar exclusive audience at sessions, wherever four or more barristers attended. In *Reg.* v. *Ingham* (2) a rule nisi for certiorari to bring up and quash a coroner's inquisition was refused, so far as the ground relied on was the admission of unsworn testimony. I may be wrong in referring to cases on foreign judgments, for the counsel engaged in this case have not thought it germane to do so, but as the expression "contrary to natural justice" has frequently been before the Courts in that connection I have thought it right to see what import has been given to it there before putting upon it an interpretation of my own. It has often been pointed out that the expression is sadly lacking in precision. At one time it was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of our own common law Courts, but times have changed. In *Buchanan* v. *Rucker* (3) Lord Ellenborough at nisi prius declared that the practice of the Law Courts of Tobago to summon a defendant who was out of the jurisdiction and never had been within it, by nailing the writ on the door of the court-house, "is contrary to the first principles of reason and justice . . . . it is mala praxis, and cannot be sanctioned." Nevertheless this weighty opinion, which having regard to the circumstances seems, I must say, to be very temperately expressed, was coldly dismissed as "declamation" by the Court of Queen's Bench in *Schibsby* v. *Westenholz* (4), and, following the judgment of Blackburn J. in that case, the best text-writers on private international law regard the expression "contrary to natural justice," when applied to the procedure of foreign Courts, as being no more than a test, by which to decide whether the foreign Court

(1) (1846) 9 Q. B. 279.
(2) (1864) 5 B. & S. 257.
(3) (1807) 1 Camp. 63, at p. 66.
(4) (1870) L. R. 6 Q. B. 155, at p. 160.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

was a Court of competent jurisdiction or not, whether it had so summoned the defendant before it as to give it the right, in the eyes of English Courts, to proceed in its own way to pass subsequent judgment upon him. The defence that the foreign judgment is contrary to natural justice is now "narrowed down to the question of assumption of jurisdiction over absent defendants" (Piggott, Foreign Judgments, 2nd ed., p. 171; and see Dicey, Conflict of Laws, p. 409; Foote, Private International Jurisprudence, 2nd ed., p. 558). The most complete judicial indications that I can find of the meaning of this vague expression are two: first, that of Mellish L.J. in *Ochsenbein* v. *Papelier* (1): "It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained"; second, that of Bramwell B. in *Crawley* v. *Isaacs* (2): "the term 'natural justice' which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case. . . . . If the proceedings be in accordance with the practice of the foreign Court, but that practice is not in accordance with natural justice, this Court will not allow itself to be concluded by them." How then stand the decisions upon the relation to natural justice of the procedure of foreign Courts? The following three cases are significant of the reserve with which our law now affixes this censure to procedure not its own. In *Messina* v. *Petrococchino* (3) the Privy Council decided that a judgment of the Greek Royal Commercial Chancery at Constantinople was rightly enforced as a foreign judgment by the Court of Appeal at Malta and was not impeachable as being "wanting in the conditions of natural justice," although, under the procedure of that Court, "without communication or attempt at communication with" the cargo owner at Malta, and not on account of the condition of the cargo but because the carrying ship was disabled from proceeding to Malta, the judgment had appointed a stranger to be curator of

(1) (1873) L. R. 8 Ch. 695, at p. 700.

(2) (1867) 16 L. T. 529, at p. 531.

(3) (1872) L. R. 4 P. C. 144.

the cargo, and had directed him to borrow money on the security of it by "bottomry bond" for the payment as particular average of the cost of transhipping and forwarding including the curator's own commission. In *Dent* v. *Smith* (1), when it was contended that all parties were bound by a judgment of the Russian Consular Court at Constantinople, the Court of Queen's Bench so held, declaring that it had "nothing to do" with the defendant's objection that, Russian maritime law being in question, the Court had allowed it to be proved by French advocates, "the laws of the two countries being with reference to these matters almost the same," and because only French advocates were then resident in Constantinople and no Russian advocate was to be had. In *Boissiere* v. *Brockner* (2) Cave J. stigmatized as "empty declamation" an objection to the procedure of the Court of Appeal at Rouen, whose judgment he decided to enforce, though the objection was no less than this, that the Court, having given judgment on the questions of principle, appointed the plaintiff's solicitor as referee to settle the accounts between the parties on the basis laid down in the judgment and to report the result to the Court, a report which naturally the Court adopted.

I cannot but feel deeply impressed by these object-lessons in toleration with regard to the procedure of other tribunals. I cannot but feel that all that can be urged against the Local Government Board might be still more forcibly urged against the Court of Criminal Appeal. Though in the long run I must decide for myself, I cannot but be impressed by the unanimous decision of the Divisional Court in the present case. The decisions which I have cited shew that acts done in judicial proceedings, various in form but all obnoxious to the same kind of objection as is urged here, and all contrary to a first impression of natural, if that means ideal, justice, have still been regarded as entirely consistent with our law. There is no place here for a phrase which was used in argument, namely, the appellant's "common law right" to stand before his judge. There is no question here of rights attaching at common law to common law Courts. The Local Government Board here is a

(1) (1869) L. R. 4 Q. B. 414, at p. 446. (2) (1889) 6 Times L. R. 85.

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

statutory tribunal, anomalous as compared with common law Courts, created by the Legislature for a special class of appeals and endowed by it with the power of formulating its own procedure. We must assume that a department which the Legislature has trusted will be worthy of the trust. The judgment of such a tribunal, regular on its face, is surely entitled to as much credit as that of a foreign Court. The observations, made in the cases most cognate to the present, point in the same direction. What is said by Field J. in *Parsons* v. *Lakenheath School Board* (1) is very inconclusive. The language of Lord O'Brien C.J. and Madden and Wright JJ. in *Rex* v. *Local Government Board* (2) is strong to shew that the procedure of such a tribunal as this must necessarily be judged by standards different from those of ordinary Courts. I think that just reliance was placed on that case by the learned judges in the Divisional Court. Lord Loreburn's words in *Board of Education* v. *Rice* (3) seem to me to be much in point. The Board must "act in good faith and fairly listen to both sides." I think the Local Government Board has done so. Who is to listen and who is to be "heard" and when and how and how long is all matter of procedure to be determined by the Board itself. Lord Loreburn continues: "I do not think they are bound to treat such a question as if it were a trial." The same is true here. I know it is said that the question in the case of Rice was "departmental," whatever that may mean, but in any case that is no sufficient distinction. The question there must necessarily have been deemed to involve a judicial decision and not merely a ministerial or administrative act; otherwise proceedings by way of certiorari could not have been entertained at all. I fail to see how managers of a non-provided school, as such, can be put off with a less measure of just procedure than is to be meted out to the leaseholder of a house, which is unfit for human habitation. Lord Loreburn's third requirement—"giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statements prejudicial to their view"—has in my opinion been amply satisfied here. The

(1) 58 L. J. (Q.B.) 371. (2) [1911] 2 I. R. 331.
(3) [1911] A. C. 179, at p. 182.

canon does not involve that the appellant shall enjoy a formal general reply. The appellant had heard the case against him put at its highest by the witnesses at the inquiry. He had enjoyed on that occasion, as the Act meant him to enjoy, the opportunity of "correcting or contradicting" it. The most that he can say of the inspector's report is that he has never known whether the inspector agreed with his adversaries in toto or differed from them to some extent, but he knew the worst that could be said against him and had contradicted it as far as he could. The inspector's report could not state it any worse for him. We are bound to remember that this is an appeal upon a concrete case, and we cannot decide it upon any abstract principle or upon any assumption beyond the facts of the case itself. The issue on this appeal was excessively simple. The only difficulty was to make out what the appellant could have to say for himself. The question of the propriety of the closing order had been concluded against him. It must be deemed to have been rightly made, for the purposes of this appeal, against the local authority's refusal to determine it. I assume for the purposes of this case both the good faith and the reasonableness of the appellant, but he made it quite plain on the inquiry that his case was that the closing order ought never to have been made at all. He had done nothing to cure the alleged dampness of the house—he said that it was not damp. He therefore enjoyed at the inquiry the fullest opportunity of knowing what he had to meet and of meeting it. The inspector's report could not be really material to the conduct of his appeal and if the deciding officer was wrong, as I think he was not, in considering the reports without first communicating them to the appellant and hearing him upon them, the error was unsubstantial and could not reasonably affect his decision. In the language of Order xxxix., r. 6, no "substantial wrong or miscarriage has been thereby occasioned."

That the jurisdiction of the High Court to quash the proceedings of inferior Courts is most important and that its exercise is most wholesome, I fully agree. That the jurisdiction should be no less vigilantly exercised in the case of an administrative department than in the case of justices I also agree. If

C. A. 1913

REX v. LOCAL GOVERNMENT BOARD. ARLIDGE, *Ex parte.*

Hamilton L.J.

it was our function to advise the Local Government Board as to its procedure generally, or to criticize the procedure actually adopted as such, I should for my part suggest that the more open the procedure is the better. By all means let both the appellant and the local authority see the inspector's reports; a discreet and careful officer is not likely to offend, and if, in spite of discretion and care, he is harassed by actions for libel he may well be defended and indemnified by his department. By all means let the appellant, and the local authority too, if it wishes, see and address the judge: it is all in his day's work. By all means let the appellant have the last word and as many of them in reason as he likes. Time spent in removing a grievance or in avoiding the sense of it is time well spent, and the Board's officials will, like good judges, amplify their jurisdiction by rooting it in the public confidence. But after all I am neither the adviser nor the critic of the Local Government Board. For myself I have no fault whatever to find with the manner in which the Board has stated the facts to us, and has presented for our consideration the views which it adopts and the grounds on which it adopts them. The question is "Did the Divisional Court rightly discharge the rule nisi in this case?" The grant or refusal of a rule absolute for a certiorari is always a matter of judicial discretion and, guiding myself by the prescriptions of the Legislature and the decisions of the Courts, I am of opinion that the discharge of the rule nisi was right, and that the appeal should be dismissed.

Appeal allowed.

Solicitors for the appellant: *Rubinstein, Nash & Co.*
Solicitors for the Local Government Board: *Sharpe, Parker & Co.*
Solicitor for the Hampstead Borough Council: *A. P. Johnson.*

NOTE.—Housing, Town Planning, &c. Act, 1909 (9 Edw. 7, c. 44), s. 17, sub-s. 2: "If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state," (i.e., in a state so dangerous or injurious to health as to be unfit for human habitation) "it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

Sub-s. 3: "Notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the order is served upon him."

. . . . . .

Sub-s. 6: "The local authority shall determine any closing order made by them if they are satisfied that the dwelling-house, in respect of which the order has been made, has been rendered fit for human habitation.

"If, on the application of any owner of a dwelling-house, the local authority refuse to determine a closing order, the owner may appeal to the Local Government Board by giving notice to the Board within fourteen days after the application is refused."

Sect. 39, sub-s. 1: "The procedure on any appeal under this Part of this Act, including costs, to the Local Government Board shall be such as the Board may by rules determine, and on any such appeal the Board may make such order in the matter as they think equitable, and any order so made shall be binding and conclusive on all parties, and, where the appeal is against any notice, order, or apportionment given or made by the local authority, the notice, order, or apportionment may be confirmed, varied, or quashed, as the Board think just.

"Provided that—

"(*a*) the Local Government Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal; and

"(*b*) the rules shall provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry."

Under this section there have been made among others the following

RULES DATED JANUARY 11, 1910, WITH REFERENCE TO APPEALS.

Rule 1: "Every appeal to the Local Government Board shall be made to and brought before the Local Government Board by means of a letter, or other representation in writing (hereinafter referred to as a 'statement of appeal') which shall be addressed and posted, or shall be otherwise given, sent, or delivered to the Local Government Board at their office, and of which a copy shall, at the same time, be addressed and posted, or shall be otherwise given, sent, or delivered to the local authority at their office."

Rule 4: "Every statement of appeal shall be accompanied by every such document as an appellant has in his possession or at his disposal, and is able to furnish, and as consists of, or comprises, or gives particulars of, any notice, order, demand, or apportionment relating to the grounds or subject-matter of the appeal, or otherwise relating to any material facts set forth in the appeal; and shall show by appropriate particulars in the statement of appeal, or by an appropriate entry on any such document accompanying the statement of appeal, the date of service upon an appellant of the notice, order, demand, or apportionment."

Rule 5: "Where an appeal appears to the Local Government Board to

C. A.
1913

REX
v.
LOCAL
GOVERN-
MENT BOARD.
ARLIDGE,
Ex parte.

require, for its due consideration, that information, other than such information as is set forth in the statement of appeal, or is supplied by means of any document accompanying the statement of appeal, or by means of any statement by or correspondence with an appellant or the local authority respecting the appeal, shall be furnished to the Local Government Board, the requisite information shall, on the written request of the Local Government Board, be furnished by an appellant or by the local authority, as the case may be, in such manner, in such form, and within such time as the Local Government Board in writing specify."

Rule 8: "Except so far as this Rule otherwise provides and so far as regards any costs incurred by the Local Government Board in relation to a public local inquiry held in pursuance of these Rules, all costs of and incidental to an appeal shall, when incurred by an appellant or by the local authority, be borne by the appellant or by the local authority as the case may be: Provided that the Local Government Board may by an order made under sub-s. 1 of s. 39 of the Housing, Town Planning, &c. Act, 1909, direct by whom any such costs, when incurred by an appellant or by the local authority, shall be borne; and that nothing in this Rule shall have effect in contravention or in derogation of any such direction."

Rule 9: "The Local Government Board shall not dismiss an appeal without having first held a public local inquiry.

"Where the Local Government Board are required to hold a public local inquiry, and written notice of the time and place at which the inquiry will be held has been given by the Local Government Board to every appellant and to the local authority, a printed copy of the notice shall be posted by the local authority at every place specified in writing by the Local Government Board as necessary or suitable for the purpose."

F. O. R.

BUNT, Appellant *v.* KENT, Respondent.

1913
Nov. 12.

Education—Public Elementary School—Special Instruction—Cookery Centre—Compulsory Attendance—Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 7, *sub-s.* 4; *s.* 97.

The Board of Education's Code of Regulations for Public Elementary Schools for 1912 provides for annual parliamentary grants to be given for special instruction in certain specified subjects, including cookery, which may be taught at centres to scholars from more than one school.

The respondent's daughter, aged eleven years, who ordinarily attended a public elementary school at L., had been selected by the local education authority with other scholars from that school to receive special instruction in cookery and to attend a cookery centre at a school at F. which was within two and a half miles of the child's residence. On a day when, as the respondent knew, the child was required to attend the cookery centre at F. school, the respondent sent the child to L. school, where she was refused admittance. The respondent was charged with having on the day in question unlawfully neglected and omitted to cause his child to attend school contrary to a by-law of the local education authority:—

Held, that the attendance of the child at the F. school for the purpose of receiving instruction in cookery was compulsory, and that the respondent had committed a breach of the by-law.

Case stated by justices of Cornwall.

An information was preferred by the appellant, the clerk to the local education authority for the county of Cornwall, against the respondent, for that in the area of the said local education authority on March 3, 1913, he being the parent of Marian Kent, a child of the age of eleven years residing within the said area, unlawfully neglected and omitted to cause the said child to attend school as required by the by-laws made and confirmed in pursuance of the Elementary Education Acts, 1870 to 1907.

Upon the hearing of the information the following facts were proved or admitted:—The child was one of the scholars selected by the local education authority from the Lanjeth school to attend the cookery centre at Foxhole school, situate about a mile and three-quarters from the Lanjeth school. The respondent had been officially notified of this fact by oral and written notices. There were no means of teaching cookery at the Lanjeth school. The respondent had objected and still declined to send

1913

BUNT v. KENT.

the child to the cookery centre at Foxhole school. On March 3 the child was sent to its own school at Lanjeth and attempted to get admission, but was refused by the master thereof and told to go to the cookery centre at Foxhole. The child's ordinary attendance at the Lanjeth school was exceptionally good. The Lanjeth school was the nearest public elementary school to the child's residence and she had attended there all her school life. Foxhole school was within two miles of the child's residence.

The by-laws in force in the county of Cornwall were sealed by the Board of Education on July 16, 1909. Numbers 2 and 3 of the said by-laws were as follows:—

"2. The parents of every child of not less than five, nor more than fourteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance.

"Any of the following reasons shall be a reasonable excuse namely:—

"(*a*) That the child is under efficient instruction in some other manner.

"(*b*) That the child has been prevented from attending school by sickness or any unavoidable cause.

"(*c*) That there is no public elementary school open which the child can attend within two and a half miles measured according to the nearest road from the residence of such child, provided that, when a local education authority provide suitable means of conveyance for a child between a reasonable distance of its home and a public elementary school, such reason shall not be a reasonable excuse (7 Edw. 7, c. 43, s. 14 (1.)).

"3. The time during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age."

No evidence was given on behalf of the respondent, but his advocate contended that the purpose for which the child was required to be sent to Foxhole school, namely, the teaching of cookery, was not one of the purposes set out in the by-laws for the education of children attending an elementary school or in any of the Education Acts, and that moreover no child could be compelled to attend two schools under the Elementary Education Acts; that so long as the child was on the books of the Lanjeth

school the education authority had no power to order the child to attend another school to receive instruction in any special subjects; that the respondent objected to his child attending any school but Lanjeth school, which he had himself selected; and that the child having presented herself at the Lanjeth school on the day mentioned in the information the respondent could not be convicted of the offence charged against him.

The appellant contended that as the Board of Education had approved of the establishment of centres for the instruction of children in special elementary subjects, not only cookery, but laundry work, dairy work, and housewifery for girls, and woodwork and gardening for boys, and as the subject of cookery was an approved part of the instruction for certain girls from Lanjeth and other schools, and the child in question was eligible and had been selected to take it, the attendance of the child at the Foxhole centre for the purpose of receiving such instruction was compulsory.

The justices dismissed the information, being of opinion that, the child having presented herself for admission at the Lanjeth school on the date in question, the local education authority had no right to order the child to proceed to any other centre during the school session for instruction in any special subject, and, therefore, they had no power to convict under the by-laws or otherwise.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

Cecil Walsh, K.C., for the appellant. On the facts stated in the case it is clear that the respondent did in fact neglect to cause his child to attend school on March 3, 1913, for he sent her to Lanjeth school knowing that she was required to go to the cooking centre at Foxhole school, and, if a child is sent by her parent to a particular school house when it is known to the parent that the child will not be admitted there, the child has not attended school: *Saunders* v. *Richardson* (1); *Jones* v. *Rowland*. (2) The by-laws of this local education authority

(1) (1881) 7 Q. B. D. 388. (2) (1899) 80 L. T. 630.

1913

BUNT v. KENT.

state certain reasons (none of which apply to this case) which shall be reasonable excuses for non-attendance; but those reasons are not exhaustive: *Belper School Attendance Committee* v. *Bailey* (1); *Marshall* v. *Graham.* (2) The question in this case, therefore, is in substance whether it is a reasonable excuse for the non-attendance of a child at school that the child has been required to attend a cookery centre held in a building which is not the school house of the school ordinarily attended by the child. The answer to that question depends on whether it was within the powers of the local education authority, first, to compel the child to receive instruction in cookery, and, secondly, to receive it at the Foxhole school. Every child is bound by law to receive instruction in elementary education. There is no definition in any of the Education Acts of what is elementary education, but s. 7, sub-s. 4, of the Elementary Education Act, 1870, enacts that every public elementary school shall be conducted in accordance with the conditions required to be fulfilled in order to obtain the annual parliamentary grant, and by s. 97 the conditions are "those contained in the minutes of the Education Department in force for the time being"; the minutes are now known as the Code of Regulations of the Board of Education. The Code for 1912 provides by clause 34 for grants to be given for special instruction in certain specified subjects, which include cookery, laundry work, housewifery, and dairy work for girls, and handicraft, i.e., woodwork, and gardening for boys. If a local education authority decides that instruction in any one or more of these special subjects is to be given to selected scholars attending a particular school, then the special subject becomes for those scholars part of the ordinary curriculum of the school, and instruction in the special subject is compulsory just as in the case of the other branches of elementary education. Cookery was one of the subjects taught to certain of the scholars, including the respondent's child, attending the Lanjeth school, and the respondent had, therefore, no right to say that his child should not receive instruction in that subject. The contention of the respondent that, as his child ordinarily

(1) (1882) 9 Q. B. D. 259. (2) [1907] 2 K. B. 112.

attended the Lanjeth school, the local education authority had no power to compel her to attend the cookery centre at Foxhole school, rests upon a misapprehension of the meaning of the word "school" when used in connection with attendance. It is not confined to school house, but includes any place which is selected for the giving of instruction in the subjects taught in a particular school. It is obvious that most of these special subjects from their very nature could not be taught in every ordinary school house, for they require special appliances and some of them, such as gardening, would necessarily have, in part at any rate, to be taught out of doors. The Code recognizes this and provides in Sched. III., clause 2, for courses of instruction in the special subjects to be given in centres to scholars from more than one public elementary school, in premises approved by the Board for the purpose (clause 3), which premises must be suitably equipped and adequately supplied with materials for the use of the scholars in practical work (clause 4), and by clause 19 (*a*) not less than half the time must be assigned to practical work by the scholars with their own hands. The present case, therefore, is not one in which a child has been required to attend at two schools, as was contended on behalf of the respondent before the magistrates. The child's school is Lanjeth, but a part of the curriculum of that school in which this child has to receive instruction is taught, not in the school house at Lanjeth, but in the Foxhole school house. The respondent was, therefore, bound to cause his child to attend at the Foxhole school for that purpose, and having failed to do so he should have been convicted. [*Reg.* v. *Cockerton* (1) and the Education Act, 1902 (2 Edw. 7, c. 42), s. 22, sub-s. 2, were also referred to.]

The respondent did not appear.

DARLING J. The question in this case arises on a case stated by justices. The respondent is the parent of a girl eleven years old who was in the habit of attending the school at Lanjeth. She was one of the scholars attending that school who was selected by the local education authority to receive instruction in cookery at what is called a cookery centre at Foxhole

(1) [1901] 1 K. B. 322, 726.

1913

BUNT v. KENT.

Darling J.

school. Both schools are situated at such a distance from the girl's home as to make it lawful to require her attendance at one or other of them. It appears that there were no means of teaching cookery at the Lanjeth school and that is why she was required to attend the Foxhole school, where cookery lessons could be given, cookery being one of the subjects in which she could be lawfully required to receive instruction. The respondent objected to send his child to Foxhole and on March 3, 1913, sent her to the Lanjeth school at a time when she was required to be at Foxhole for the purpose of receiving instruction in cookery. She was refused admittance at the Lanjeth school and told to go to the cookery centre at Foxhole school. The by-laws of this local education authority provide that the parent of every child of not less than five, nor more than fourteen, years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance, and then the by-laws set out certain reasons which shall be reasonable excuses.

In my opinion the respondent did cause his child to attend school when he sent her to the Lanjeth school to receive instruction in the curriculum taught there; but the contention of the local education authority, which I think is correct, is that the respondent failed to cause his child to attend school for the particular purpose of receiving instruction in cookery if he sent her to Lanjeth school, where there was no means of providing instruction on that subject, instead of to Foxhole school, where cookery could be, and was being, taught. I think confusion has arisen through the use of the word "school."

The word has a wider meaning than that of a school building; for example one speaks of a school of painters; and some parts of the school course, such as practical gardening, cannot be taught in a school house, and therefore a child may be said to be attending a school at a time when she is in fact receiving instruction not in the school building but elsewhere. If in the present case one were to speak of the child's being taught cooking at Foxhole kitchen, instead of at Foxhole school, the position taken up by the respondent would be even more difficult to maintain.

The law on the subject appears to stand thus: A public elementary school has to be conducted in accordance with the

conditions required to be fulfilled in order to earn the parliamentary grant. By s. 97 of the Elementary Education Act, 1870, the conditions required to be fulfilled by a public elementary school in order to obtain the annual parliamentary grant shall be those contained in the minutes of the Education Department for the time being; those minutes are now called the Board of Education's Code of Regulations. In addition to the elementary subjects, reading, writing, and arithmetic, instruction in which is obligatory in the case of every child, there are other special subjects mentioned in the Code in respect of which grants are payable if a local education authority decides that courses of instruction in them shall be given, and if a child is selected for instruction in any of those subjects, it becomes just as much obligatory for the child to receive instruction in that subject as in the three primary subjects of education. The Code does not require that every child must learn every one of the special subjects, and the question as to how many children shall receive this special instruction and as to which of the special subjects shall be taught is settled by the local education authority, and must of course depend to some extent upon whether in a particular school district there are any means of teaching them. The subjects for special instruction are set out in art. 34 (*a*) of the Code for 1912, and include cookery, laundry work, dairy work, and gardening. It is obvious that some of these subjects could not be efficiently taught in an ordinary school building which has been provided for the teaching of such subjects as reading, writing, and arithmetic. For the purpose of receiving instruction in dairy work or gardening, for example, a child would have to attend at some place where proper appliances for those kinds of work could be provided, and therefore we find in Sched. III. of the Code regulations for the teaching of these special subjects which provide that the premises in which instruction in special subjects is given "must be suitably equipped and adequately supplied with materials for the use of scholars in practical work," and with reference to "cookery, laundry work, housewifery and mixed courses of instruction in domestic subjects," regulation 19 (*a*) provides that "each lesson should as a rule include both demonstration and practice, and not less than half the time

1913

BUNT v. KENT.

Darling J.

must be assigned to practical work by the scholars with their own hands." Now, if it is desired to teach dairy work or gardening you can only give demonstration and practice at a dairy or in a garden. It would be absurd to have some children milking cows, making butter and working churns, or potting plants, in a class-room where other children are supposed to be learning to read and write. It is clear, therefore, that unless the children selected for special instruction in these subjects are required to attend in appropriate places where the requisite appliances are provided, they could not receive instruction in these subjects at all. It was, in my opinion, within the powers of this local education authority to say that the cookery class of the scholars attending the Lanjeth school should be held at the Foxhole school, where facilities were provided for giving instruction in that subject, instead of at Lanjeth, where there were no facilities, and, therefore, the respondent had no reasonable excuse for his failure to cause his child to attend the Foxhole school for that purpose.

For these reasons I have come to the conclusion that the decision of the magistrates was wrong, and that this appeal must be allowed.

AVORY J. I am of the same opinion. The respondent was summoned for neglecting and omitting to cause his child to attend school as required by the by-laws of the local education authority. It was held in *Saunders* v. *Richardson* (1), and we are bound by that decision, that a parent, who sends his child to a particular school when he knows that in the circumstances the child will be refused admittance to that school, is not causing the child to attend school and has no reasonable excuse for the child's non-attendance. In the present case the respondent's child ordinarily attended the Lanjeth school, but for the purpose of receiving instruction in cookery she was required to attend at the Foxhole school. Instead of sending her to the Foxhole school for this purpose, the respondent sent her to the Lanjeth school, knowing that she would not be admitted there. Therefore, prima facie, the respondent did not cause his child to attend

(1) 7 Q. B. D. 388.

school. The only question which remains is whether it was within the powers of the local education authority to direct that, for the purpose of receiving instruction in cookery, this child should attend the Foxhole school, or, as, I think, it might be more accurately expressed, should attend the cookery class held in the Foxhole school house. I am satisfied that the contentions raised by the appellant before the magistrates are well founded. The Board of Education had approved of the establishment of centres for the instruction of children in special elementary subjects, including cookery; that appears from the Code of Regulations for 1912. The local education authority had approved of cookery as part of the instruction for certain girls from Lanjeth and other schools and the child in question had been selected to take it. I think it follows from this that the attendance of the child at the cookery class at the Foxhole school was compulsory, and therefore the master of the Lanjeth school was right in refusing to admit the child to that school on March 3. It is further found as a fact that the respondent had been officially notified that his child was to attend the cookery centre at Foxhole and that he refused to send her there. The respondent therefore knew that his child would not be admitted to the Lanjeth school, and it follows that he had failed to cause the child to attend school, without reasonable excuse. I think, therefore, that the magistrates ought to have convicted.

ATKIN J. I agree. The contentions of the appellant before the magistrates as stated in the case were that "as the Board of Education had approved of the establishment of centres for the instruction of children in special elementary subjects, not only cookery, but laundry work, dairy work, and housewifery for girls, and woodwork and gardening for boys, and as the subject of cookery was an approved part of the instruction for certain girls from Lanjeth and other schools, and the child in question was eligible and had been selected to take it, the attendance of the child at the Foxhole centre for the purpose of receiving such instruction was compulsory." For the reasons given by my Lord and by my brother Avory I am of opinion that the contention of the appellant was right, but our decision goes no further

1913

BUNT v. KENT.

than that. The magistrates ought therefore to have convicted the respondent.

Appeal allowed.

Solicitors for appellant: *May, How & Chilver, for C. L. Cowlard, Bodmin.*

F. O. R.

1913

Nov. 14.

OAKEY, APPELLANT *v.* JACKSON, RESPONDENT.

Children—Wilful Neglect by Parent—Injury to Health—Failure to provide adequate Medical Aid—Refusal to permit an Operation—Offence—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1.

Under s. 12, sub-s. 1 of the Children Act, 1908, it is an offence if the parent of a child wilfully neglects the child in a manner likely to cause injury to the child's health, and if a parent fails to provide "adequate medical aid" for his child he "shall be deemed to have neglected him in a manner likely to cause injury to his health."

The respondent's daughter, aged thirteen, was suffering from adenoids and in consequence her health was being injured. The only possible remedy was a surgical operation for the removal of the adenoids. The operation was not a dangerous one, but the respondent refused to allow his daughter to undergo it. He was summoned for an offence under the above section, and the justices dismissed the information on the ground that the respondent was under no legal liability to allow the operation:—

Held, that the refusal of a parent to allow his child to undergo an operation might constitute a failure to provide adequate medical aid within the meaning of s. 12, sub-s. 1, of the Act; that the question was one of fact to be decided on the evidence in each particular case, consideration being had to the nature of the operation and the reasonableness of the parent's refusal to allow it; and that on the above facts the respondent might have been convicted.

CASE stated by justices for Leicestershire.

At a Court of summary jurisdiction sitting at Melton Mowbray an information was preferred by Oakey, the appellant, under s. 12, sub-s. 1, of the Children Act, 1908 (1), against

(1) Children Act, 1908 (8 Edw. 7, c. 67), s. 12: "(1.) If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully . . . . neglects . . . . such child or young person, or causes or procures such child or young person to be . . . . neglected . . . . , in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury

Jackson, the respondent, for that he being a person over the age of sixteen years and having the custody, charge, or care of Hilda Jackson, a child under the age of sixteen years, did unlawfully and wilfully neglect the said child in a manner likely to cause unnecessary suffering or injury to health.

Upon the hearing of the information the following facts were proved:—

The respondent was above the age of sixteen years and was the father, and the person having the custody, charge, or care, of Hilda Jackson, a child under the age of sixteen years.

The child on January 15, 1913, was, and had for some time previously been, suffering from adenoids which were causing mental dulness, impaired breathing, deafness and some anæmia, and the child was consequently suffering injury to her health which required to be remedied, and the only possible remedy was a surgical operation for the removal of the adenoids.

The respondent on January 15, 1913, had neglected and refused, and did then neglect and refuse, to allow the child to undergo the operation necessary for the removal of the adenoids. The operation was not a dangerous one, but in all probability it would have necessitated the administration of an anæsthetic.

The respondent and his wife (the mother of the child) did not consider an operation necessary and did not believe in operation and refused to allow the child to go to the infirmary for the purpose of having the operation performed.

Beyond the refusal to allow the operation to be performed no evidence of neglect of the child by the respondent was given.

On the part of the appellant it was contended that by

---

to or loss of sight or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, ...; and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor."

1913

OAKEY v. JACKSON.

neglecting and refusing to allow the operation to be performed the respondent had neglected to provide adequate medical aid for the child and must, therefore, be deemed to have neglected her in a manner likely to cause injury to her health.

On the part of the respondent it was contended that by the Act compulsion to allow a surgical operation to be performed was not contemplated, and that the performance of the operation and the administration of an anæsthetic must involve a certain amount of danger to the life of the child, and that the respondent was justified and entitled to refuse to allow any such operation to be performed, and that by such refusal he did not fail to provide adequate medical aid within the meaning of the Act.

After considering the evidence the justices came to the conclusion that the respondent was under no legal liability to allow the operation to be performed, and that the refusal to allow such operation to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Act, and that, therefore, the respondent was not guilty of unlawfully and wilfully neglecting the child in a manner likely to cause the child unnecessary suffering or injury to health, and they declined to convict the respondent and dismissed the information.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

Sir Ryland Adkins, for the appellant. The justices have held that the respondent was under no legal liability to permit his child to undergo the operation, but they have found as a fact that the child was suffering from injury to her health which could only be remedied by the operation. That is tantamount to a finding of fact that the respondent has failed to provide adequate medical aid, and therefore, under the concluding paragraph of s. 12, sub-s. 1, of the Act, the respondent is "deemed to have neglected" his child "in a manner likely to cause injury to" the child's health. The justices should therefore have convicted the respondent. [He referred to *Reg.* v. *Senior*. (1)]

The respondent did not appear.

(1) [1899] 1 Q. B. 283.

1913

OAKEY v. JACKSON.

DARLING J. This case has been stated by justices in order to resolve a difficulty which has arisen in their understanding of s. 12 of the Children Act, 1908. Under that section a parent who wilfully neglects his child in a manner likely to cause injury to the child's health is guilty of an offence, and the section further enacts that a parent who fails to provide adequate medical aid for his child shall be deemed to have neglected him in a manner likely to cause injury to his health. The respondent, who is the father of a girl under the age of sixteen, was summoned for an offence under that section. The child was suffering from adenoids which, as the justices have found, were causing mental dulness, impaired breathing, and deafness (which is one of the things expressly mentioned in the section as included in the expression injury to health), and anæmia, and the child was in consequence suffering injury to her health which required to be remedied. The case further finds as a fact that the only possible remedy was an operation for the removal of the adenoids. The respondent had been requested to allow this operation to be performed on his child, but he neglected and refused to do so. It is stated in the case that the operation is not a dangerous one, but that it would probably necessitate the administration of an anæsthetic. It is well known that nowadays anæsthetics are given in many cases where the operation is quite trivial. Sect. 12 in terms says that the failure to provide adequate medical aid shall be deemed to be neglect likely to cause injury to health, and in my opinion the reference in the section to "injury to or loss of sight" shews clearly that it was contemplated that there might be cases in which a parent was bound to allow his child to undergo an operation. The meaning of the expression "wilful neglect" in this connection was considered by Lord Russell of Killowen C.J. in *Reg.* v. *Senior* (1), where he said: "'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as

(1) [1899] 1 Q. B. at pp. 290, 291.

1913

OAKEY v. JACKSON.

Darling J.

the present, provided the parent had such means as would enable him to take the necessary steps." Applying that to the facts of this case, it is not necessary to know much about surgery to know that the operation for the removal of adenoids is very common in the case of children, and that a failure to perform the operation may result in danger to the child's life if the child should ever happen to be attacked with illness.

We are of opinion that in the present case the justices have not applied their minds to the proper question. They say that they "came to the conclusion that the respondent was under no legal liability to allow the operation to be performed, and that the refusal to allow such operation to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Act." That begs the question. The parent was under a legal liability to allow the operation if the refusal to do so was in the circumstances a failure to provide adequate medical aid. Whether it is or is not so must depend on the facts of each particular case. A refusal to allow an operation is not necessarily such a failure to provide adequate medical aid as to amount to wilful neglect causing injury to health. The question is one of fact to be decided in each case on the evidence, and the justices in deciding that question must take into consideration the nature of the operation and the reasonableness of the parent's refusal to permit it. On the facts stated in this case we are of opinion that the justices might very properly have convicted the respondent. But the question is one for the justices to decide and the case must go back to them for further consideration.

AVORY J. I am of the same opinion, and I only wish to add that one matter to be taken into consideration by the justices in deciding cases of this kind is whether the person who advises the operation is a qualified medical practitioner or merely some irresponsible person.

ATKIN J. I agree.

Case remitted to justices.

Solicitor for appellant: *W. J. Freer.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A. 1913 *July* 22, 23, 24.

METROPOLITAN WATER BOARD *v.* AVERY.

Water—Supply—London—"Domestic Purposes"—Trade Purposes—Public-house—Catering Business—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 25.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service pipe of the Water Board is laid or of any person who under the provisions of the Act is entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person a supply for domestic purposes at a rate per cent. upon the rateable value of the house or building. By s. 25 the expression "domestic purposes" shall not include a supply for any of the following purposes (inter alia), "any trade, manufacture, or business."

The defendant was the occupier and licensee of a public-house, within the district of the Metropolitan Water Board, which was supplied with water in the ordinary way by supply pipes from the Water Board's mains. The water so supplied was charged for as a supply for domestic purposes by a rate of 5 per cent. upon the rateable value of the house. The defendant carried on in the house, in addition to the ordinary business of a public-house, a catering business for persons who came there to lunch but who did not reside there. Luncheons were served there every day, which involved an increased use of water for such purposes as cooking and washing up plates and dishes. The Water Board claimed to be entitled to make a small extra charge for the water so used, in addition to the charge of 5 per cent. upon the rateable value of the house, upon the ground that the water was used for other than "domestic purposes":—

Held, that, as the use of the water was in its nature domestic, the supply was for "domestic purposes" within the meaning of s. 25, and the fact that the existence of the business necessitated an increased supply for domestic purposes did not make it a supply for the purposes of the business; and that therefore the Water Board were not entitled to make the extra charge.

Decision of the Divisional Court [1913] 2 K. B. 257, affirmed. (1)

APPEAL from the judgment of a Divisional Court (Channell and Bray JJ.), reported [1913] 2 K. B. 257.

The action was brought in the Westminster County Court to recover 5*s.*, being the amount of two quarters' water rate for a

(1) Affirmed in H. L. Dec. 12, to be reported in the Appeal Cases series in March.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

supply of water to a house, No. 1, John Street, for, as alleged by the plaintiffs, non-domestic purposes.

The defendant was the occupier and licensee of a public-house, No. 1, John Street, within the metropolitan area, which was supplied with water in the ordinary way by supply pipes from the plaintiffs', the Metropolitan Water Board's, mains. The water so supplied was charged for under s. 8 of the Metropolitan Water Board (Charges) Act, 1907, as a supply for domestic purposes by a rate of 5 per cent. upon the rateable value of the whole of the premises. (1) The defendant carried on in the house, in addition to the ordinary business of a public-house, a catering business for persons who came there to lunch but who did not reside in the house. Tables were provided for the purpose, and between twenty and thirty luncheons were served there every day, involving an increased use of water beyond what would be used in an ordinary public-house for cooking,

(1) By s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of the Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed 5 per centum of the rateable value of the house or building in respect of which the supply is required.

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water-closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes (namely):—Steam gas motor and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses or cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus; fountains or any ornamental purpose; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

washing dishes, plates, &c., and scrubbing floors. The plaintiffs made a charge of 2*s.* 6*d.* a quarter for the water so used (in addition to the charge of 5 per cent. upon the rateable value of the house) upon the ground that the water was used for other than "domestic purposes." The defendant refused to pay this charge. The present action was thereupon brought in the county court to recover two quarters' rate. The county court judge came to the conclusion that the water was used for the purposes of the defendant's trade as a caterer, and not for domestic purposes, and that the plaintiffs were entitled to be paid a reasonable sum for it under s. 18 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93). He accordingly gave judgment for the plaintiffs for the amount claimed.

The Divisional Court (Channell and Bray JJ.) held that, as the use of the water was in its nature domestic, the supply was for "domestic purposes" within the meaning of s. 25 of the Metropolitan Water Board (Charges) Act, 1907, and the fact that the use of the water was ancillary to the catering business carried on in the house, or that the existence of the business necessitated an increased supply for domestic purposes, did not make it a supply for the purposes of the business, and that therefore the plaintiffs were not entitled to recover. They accordingly allowed the appeal and entered judgment for the defendant.

The plaintiffs appealed.

Clavell Salter, K.C., and *J. Goodland*, for the plaintiffs. The catering business which is carried on in this public-house is the business of supplying the domestic requirements of the persons who come there for lunch. Therefore the question arises with reference to a business which consists in the performance of what may fairly be called a domestic operation. It is largely a question of fact in each case whether the water is used for "domestic purposes" within the meaning of that expression in s. 25 of the Metropolitan Water Board (Charges) Act, 1907, and the county court judge has found in this case that the water was used for the defendant's trade or business as a restaurant keeper and not for domestic purposes. Unless the judge has misdirected himself

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

this Court will not interfere with his finding. Upon the facts here the water was used in the defendant's trade or business as a restaurant keeper. In such cases as this where a trade or business is carried on upon premises it is the practice of the plaintiffs to make a small charge, such as 2*s.* 6*d.* a quarter, for the use of water in the trade or business in addition to the charge of 5 per cent. upon the rateable value of the premises. The water here was obviously supplied and used for the purposes of a trade or business, though the use to which it was put may have been "domestic" in the popular sense.

The so-called definition of "domestic purposes" in s. 25 is purely arbitrary. For instance a bath fitted so as not to be capable of containing when filled to the overflow pipe more than eighty gallons of water comes within the words "domestic purposes," whereas if the position of the overflow pipe is raised so as to make the bath capable of holding more than eighty gallons it ceases to come within the words "domestic purposes." Therefore a "domestic purpose" within s. 25 is not necessarily that which is ordinarily considered a domestic purpose. Sect. 25 specifies certain purposes which are expressly placed outside domestic purposes, but they are not exhaustive of non-domestic purposes, and with regard to any purpose other than those specified they afford a guide in determining whether it is a non-domestic purpose. It is submitted that s. 25 means that to come within the expression "domestic purposes" the water must be used solely for domestic purposes and not for the purposes of a trade or business or for any of the other purposes excluded by the section from domestic purposes. If the water is used for the purposes of a trade or business it is not used for domestic purposes. The section indicates that the expression "domestic purposes" covers an area within or without which every case must fall. If it is found in any case that the water is supplied for the purpose of a trade or business it is to be deemed to fall outside domestic purposes. The water here was used directly in the business, and the use was not merely ancillary to the business carried on upon the premises, as in the case of schools, boarding-houses, and lodging-houses. The decision of the Divisional Court amounts to this, that water supplied for the purposes of any trade or

business means for the purposes of any trade or business except that of supplying domestic requirements. There is no authority for excluding that trade or business. None of the decisions upon the question conclude this case, though the reasoning in the speeches of Lord Loreburn L.C. and Lord Mersey in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1) are strongly in favour of the plaintiffs. No doubt, if the decision in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) did not depend upon the fact that the water was supplied for the use of the inmates of the boarding-house, that case may be in point; but if that is the true view of the decision it is submitted that it is wrong. Moreover that case was decided upon a local Act and is not an authority upon the construction of s. 25 of the Metropolitan Water Board (Charges) Act, 1907. In *Barnard Castle Urban Council* v. *Wilson* (3) it was held by this Court that water supplied for a swimming bath, which formed part of the premises of a school conducted for charity and which was used for the educational purposes of the school, was supplied for the purposes of the business of the school and not for domestic purposes. There Romer L.J. (4) lays stress upon the fact that the swimming bath was constructed and required for the purposes of the business of the school and not for the domestic purposes of the school considered as the home of the boys. That is a good illustration of the principle contended for on behalf of the plaintiffs. In *South-West Suburban Water Co.* v. *St. Marylebone Union* (5), which was the case of a poor law school, it was held by Buckley J. that water supplied for the purposes of the school was really supplied for domestic purposes. In *Frederick* v. *Bognor Water Co.* (6), which was the case of an ordinary boys' school, Eve J. held that the carrying on of a boarding school for boys in which water was used for the domestic purposes of all the inmates was not carrying on "a business for which water is required" within the meaning of the special Act. There are also three cases on the supply of water for sanitary conveniences.

(1) [1912] A. C. 24.
(2) [1902] 1 K. B. 310.
(3) [1901] 2 Ch. 813; [1902] 2 Ch. 746.
(4) [1902] 2 Ch. at p. 757.
(5) [1904] 2 K. B. 174.
(6) [1909] 1 Ch. 149.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

In *South Suburban Gas Co.* v. *Metropolitan Water Board* (1), where water was supplied to sanitary conveniences for workmen at the plaintiffs' gasworks, it was held by Neville J. that the question was not the character of the premises, but the character of the purposes for which the water was used, and that the use of the water was for domestic and not business purposes. In *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2), where the supply was to urinals and water closets at a railway station for the use of railway passengers and of the staff, the Court of Appeal held that the supply was for "railway purposes" and therefore for purposes other than domestic within the express language of s. 25. And in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (3) it was held by the Court of Appeal and by the House of Lords that a supply of water for (inter alia) cleansing water closets and urinals in a factory was to be treated as a supply for domestic purposes. This case lays down a test applicable to all cases, namely, whether the water is supplied for use in the trade or business. Lord Loreburn L.C. said (4): "A supply for such purposes as exist in the present case is not a supply for purposes of 'trade, manufacture, or business' at all. I think those words mean a supply for use in the trade, manufacture, or business." Lord Mersey said (5): "The real question is whether water used for the mere personal convenience of men employed in a factory can be said to be water used for the purpose of the trade carried on in that factory. In my opinion such a contention is not possible. Such water is not supplied for any trade purpose at all." In that case the trade carried on was not a water-using one; in the present case it is. The use of the water there was merely incidental to the trade; here it is used directly in the trade and for the purpose of making a profit.

It is impossible to say that water which is supplied for use in a restaurant for cooking meals, &c., is not supplied for the purposes of the trade or business carried on there. If it is a supply, as Lord Loreburn said (4), "for use in the trade" it is a supply

(1) [1909] 2 Ch. 666.
(2) [1910] 2 K. B. 890.
(3) [1911] 2 K. B. 38; [1912] A. C. 24.
(4) [1912] A. C. at p. 31.
(5) Ibid. at p. 32.

for non-domestic purposes. It is, as Channell J. said in his judgment in the Divisional Court (1), "supplied to be used actually and directly in the trade." It need not be part of the stock in trade of a restaurant keeper; it is enough if it be water used for the purposes of the trade or business. If water supplied to a restaurant is supplied for domestic purposes, the words "except the trade or business of a restaurant keeper" must be read into s. 25 after the words "any trade, manufacture, or business." The Legislature intended in s. 25 to say that the use of water in a trade or business is a use for a trade or business purpose. It is for the very reason that there are some trades or businesses which have a domestic character that the Legislature has said that a supply of water for any trade or business is not a supply for domestic purposes. "Any trade, manufacture, or business" means any trade, manufacture, or business even though it may partake of a domestic character. The whole section shews that the intention was that where any water is supplied for a trade or business it is to be paid for as being supplied for a non-domestic purpose. The use of the water here was not, as Bray J. seemed to think (2), "ancillary to" the business. It was used directly in the business of cooking the meals and washing up the dishes. As to the suggestion of Channell J. (3) that "probably it would be right to look at the supply as a whole, and say whether it was substantially a trade supply or substantially a domestic supply," and if that were so "here it is substantially a domestic supply," that would be a very unsatisfactory test, and it is not supported by the language of s. 25 or by any authority. The decision of the Divisional Court was therefore wrong.

Ryde, K.C., and *Konstam*, for the defendant. There is one very important matter to be borne in mind. The Metropolitan Water Board (Charges) Act, 1907, was passed in pursuance of s. 15, sub-s. 6, of the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), so as to establish uniform scales of charges throughout the limits of supply. If the Act of 1907 uses language which had been previously construed by the Courts in a particular way, it must be taken that the Legislature intended the language to be used

(1) [1913] 2 K. B. at p. 268. (2) Ibid. at p. 265.
(3) Ibid. at p. 269.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

in the sense in which it had previously been construed. For example, in 1858 it was decided in *Busby* v. *Chesterfield Waterworks Co.* (1) that water used in a stable and coachhouse attached to a private dwelling-house for a horse and for washing a carriage kept for private use was used for a domestic purpose. Then came the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), which provided in s. 12 that a supply of water for domestic purposes should not include a supply of water for horses or for washing carriages where such horses or carriages were kept for sale or hire or by a common carrier. In 1907 the case of *Harrogate Corporation* v. *Mackay* (2) was decided, shortly before the Act of 1907 was passed, and it was held that water supplied to and used by a medical man for washing a motor car used by him for the purposes of his profession as a medical man was water supplied for domestic purposes within the meaning of s. 12 of the Act of 1863. Sect. 25 of the Act of 1907 places "washing carriages or other vehicles" outside domestic purposes, omitting the words "kept for sale or hire or by a common carrier," which were in s. 12 of the Act of 1863. That shews how carefully the Act was framed to meet the decided cases. That being so, the case of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3) must have been present to the mind of the draftsman of the Act of 1907. The decision in that case was that the occupier of a dwelling-house who carried on the business of a boarding-house was entitled to have a supply of water for his house at the rate specified for a supply for domestic purposes, although he used the water directly to carry on his business. That decision was not negatived by the Legislature in passing the Act of 1907, and they must therefore be taken to have approved of it. It is therefore an express decision before 1907 as to the meaning of words which are found in the Act of 1907, and it is too late now to question it.

Water which is used solely for ordinary domestic purposes is none the less used for domestic purposes because an increased supply for those purposes is rendered necessary by the carrying

(1) (1858) E. B. & E. 176. (2) [1907] 2 K. B. 611.
(3) [1902] 1 K. B. 310.

on of a trade or business in the house. This involves no hardship on the Water Board because in rating a public-house the business done may be taken into consideration, and therefore the charge for water on the rateable value is higher, and in that way the extra water used is really paid for. The Water Board might have claimed to charge under s. 20 of the Act of 1907, and not having done so the inference is that they would have gained little or nothing by that mode of charging. It is said that in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1) the use of the water was for a purpose ancillary to the trade carried on in the premises, whereas here the water is directly used for the business, and that the decision of the House of Lords covers only the former. But in the Court of Appeal (2) a rule was laid down wide enough to cover both cases, and if the House of Lords had thought that the rule so laid down was too wide they would not have affirmed the decision without pointing that out. Farwell L.J. said (3): "I think that the old test remains applicable, namely, that the use to which the water is put, not the nature of the premises, must be considered." Kennedy L.J. said (4): "The question whether purposes are or are not 'domestic purposes' is to be decided . . . . by reference to the purposes in themselves, and not by reference either to the character of the premises where the water is used, or that of the persons using it." This Court will follow the rule there laid down. The same principle is laid down in *South-West Suburban Water Co.* v. *St. Marylebone Union* (5), where Buckley J. also said that "the test of residence is not a test of the purposes of user"; in *Frederick* v. *Bognor Water Co.* (6); and in *South Suburban Gas Co.* v. *Metropolitan Water Board.* (7) There are also three cases relating to the removal of refuse from an hotel or restaurant which, as Channell J. said (8), afford a useful analogy: *Vestry of St. Martin's* v. *Gordon* (9), *Westminster Corporation* v. *Gordon Hotels, Ld.* (10), and *Lyons & Co.* v. *London*

(1) [1911] 2 K. B. 38; [1912] A. C. 24.
(2) [1911] 2 K. B. 38.
(3) Ibid. at p. 65.
(4) Ibid. at p. 66.
(5) [1904] 2 K. B. 174, at p. 179.
(6) [1909] 1 Ch. 149.
(7) [1909] 2 Ch. 666.
(8) [1913] 2 K. B. at p. 268.
(9) [1891] 1 Q. B. 61.
(10) [1906] 2 K. B. 39.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

Corporation. (1) They shew that the words "refuse of any trade, manufacture, or business" refer to the nature of the refuse. As Lopes L.J. said in *Vestry of St. Martin's* v. *Gordon* (2), those words mean "refuse which is the immediate and direct result of the trade, manufacture, or business; not a kind of refuse which would arise as much if there was no trade, manufacture, or business, and is only increased in quantity by reason of the trade, manufacture, or business." The decision of the Divisional Court was therefore right.

Clavell Salter, K.C., in reply.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. I have come to the conclusion that the case is covered by authority. I am far from saying that apart from the authorities and in particular the decision in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (3) I should have arrived at the conclusion at which I am now arriving. I agree with the view which was obviously taken by the learned judges in the Divisional Court that the matter is not absolutely clear and easy of decision.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service pipe of the Water Board is laid furnish to such owner or occupier a supply of water for domestic purposes at a rate not exceeding 5 per cent. of the rateable value of the house or building. Sect. 25 is the section with which we have principally to deal. That section provides that "in and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water-closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes (namely) . . . . any trade, manufacture, or business." I cannot say more as to the definition in this section of "domestic purposes" than was said

(1) [1909] 2 K. B. 588. (2) [1891] 1 Q. B. at p. 70.
(3) [1911] 2 K. B. 38; [1912] A. C. 24.

by Lord Loreburn in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1): "The definition of 'domestic purposes' is not an exhaustive definition and does not purport to be so. It is couched in slovenly and inaccurate language, but we may take the general sense to be as follows: To begin with, certain things, namely, water closets and baths, of particular dimensions, are included as 'domestic purposes'; but the expression 'domestic purposes' is not to include a supply for the purposes of 'trade, manufacture, or business.'" To my mind the principal question which we have to decide here is what is the effect of the decision of the House of Lords in that case.

The facts of the present case are concisely stated in the head-note to the report of the case in the *Law Reports.* (2) [His Lordship read the statement of facts and of the decision of the Divisional Court from the head-note.] I wish to say at once what I understand to be the ground upon which this appeal is based. It is said that the decision in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (3), especially the decision of the House of Lords, was not intended to and does not cover a case where, instead of the water being, as it was in that case, used for a purpose which was merely ancillary to the business carried on and yielded no direct profit whatever, the user of the water yielded a direct profit; that in the present case the use of the water was not merely ancillary to the business which was carried on, but yielded a direct profit; and that therefore the decision in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (3) does not cover this case. I understand counsel for the Water Board to say that, if the judgments of Lord Loreburn and Lord Mersey in that case are looked at, they afford support for the contention which I have just stated. I will take first the short judgment of Lord Mersey. He says: "My Lords, I agree for the reasons which have been stated by the Lord Chancellor, and I think the whole case can be put in a sentence. The real question is whether water used for the mere personal convenience of men employed in a factory can be said to be water used for the purpose of the trade carried on in that factory. In my

(1) [1912] A. C. at p. 31.
(2) [1913] 2 K. B. 257.
(3) [1911] 2 K. B. 38; [1912] A. C. 24.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

Vaughan Williams L.J.

opinion such a contention is not possible. Such water is not supplied for any trade purpose at all." It is said that the words used there—"the mere personal convenience of men"—shew that Lord Mersey's decision might have been different in a case where the use of the water yielded a direct profit. Lord Loreburn L.C. says: "The question is this: When a factory is equipped with lavatories, water closets, and so forth for the use of the men, required by common sense, or it may be required by law (it matters not which), is that a supply 'for the purposes of trade, manufacture, or business,' or is it 'for domestic purposes' within the meaning of this Act?" The Lord Chancellor was there dealing specifically with the same question as Lord Mersey dealt with when the latter said: "The real question is whether water used for the mere personal convenience of men employed in a factory can be said to be water used for the purpose of the trade carried on in that factory." Lord Loreburn goes on to say: "Now if there were no statutory definition, I should say that it was for domestic purposes; but there is a statutory definition, and therefore we must look and see what it is." He then criticizes the clause in the language which I have already read and proceeds: "Now, my Lords, I read s. 25 as meaning that a supply for water closets and baths of the dimensions there mentioned is to be treated as a supply for domestic purposes. Even if it were not so, a supply for such purposes as exist in the present case"—that is for the purposes of the mere personal convenience of the men—"is not a supply for purposes of 'trade, manufacture, or business' at all. I think those words mean a supply for use in the trade, manufacture, or business." I wish to point out, before I refer more particularly to the judgments of Channell and Bray JJ. in the Divisional Court, that I infer from them that they seem to recognize some limitation in the speeches which I have been reading, and that it might be argued that the learned Lords were not dealing with a case where the water supply was used for the purposes of trade, manufacture, or business in the direct sense, that is to say, where the use directly yielded a profit, but that they were dealing merely with the case where the water was used for the purpose of supplying those sorts of conveniences which decency required to be

provided where a large number of persons were assembled together at work in a factory.

I will now deal with the judgments in the Divisional Court. After stating that the question turned upon the true construction of s. 25 of the Metropolitan Water Board (Charges) Act, 1907, and that it could not be determined without a careful examination of the decisions upon the meaning of the words "domestic purposes" in this and similar Acts, Bray J., said (1): "I have carefully examined these cases, and I have come to the same conclusion as Kennedy L.J. in the case of *Metropolitan Water Board* v. *Colley's Patents, Ld.* (2) He says (at p. 66): 'I think there are some things in this case which are fairly clear. One is that, according to the views of judges now extending over many years, certainly over nine years, the question whether purposes are or are not "domestic purposes" is to be decided, as I think the language of the Act also indicates in the sections to which Farwell L.J. has referred,'"—this is how he says the question is to be tested—"'by reference to the purposes in themselves, and not by reference either to the character of the premises where the water is used, or that of the persons using it. Essentially, you have got to find out what a domestic purpose is by the nature of the user.' Farwell L.J. says (at p. 65): 'I think that the old test remains applicable, namely, that the use to which the water is put, not the nature of the premises, must be considered.'" The learned judge then said that the use to which the water was put in the present case was essentially a domestic use, and that he could not agree with the contention that, although it is a domestic purpose if the water is used in preparing a meal for the owner of a boarding-house, or his family, or his servants, or his guests, or his boarders, or in the case of an hotel the persons residing in the hotel, it is not a domestic use if it is for the person who merely comes in for lunch for which he pays. *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3) undoubtedly was decided upon the basis that the water there was used by the inmates of the house, but we now know from the decision in *Colley's Patents*

(1) [1913] 2 K. B. at p. 264. (2) [1911] 2 K. B. 38.
(3) [1902] 1 K. B. 310.

C. A. 1913

METRO-POLITAN WATER BOARD v. AVERY.

Vaughan Williams L.J.

Ld. v. *Metropolitan Water Board* (1) that we must treat *Pidgeon's Case* (2) as not being law if it is considered as a decision that the user of the water, in order to be domestic, must be a user by persons who are inmates of the house. The learned judge then says: "I can find no principle on which all the cases can rest except that one must look at the nature of the use of the water. If the water is used for a purpose which is common to all ordinary domestic establishments, it is none the less used for domestic purposes because it is ancillary to a trade, manufacture, or business." I think I have read sufficient to shew the ground of the decision of Bray J.

I come to the judgment of Channell J. After saying that the cases relating to schools, boarding-houses, and workhouses shew that a supply of water for the domestic wants of the inmates of a house where a business is carried on is not a supply "for" the business which causes those inmates to be there, the learned judge proceeded (3): "But the decisions go further and shew also that the supply in the house of the domestic wants of persons not dwelling in the house, but only brought there during the daytime because trade is carried on there at which they work, is not a supply 'for' that trade, although of course it would not be required, or at all events so large a quantity of water would not be required, but for the fact that the trade was carried on there. That is the case of *Metropolitan Water Board* v. *Colley's Patents, Ld.* (1), in the Court of Appeal and the House of Lords." The learned judge then referred to the removal of refuse cases, which he said afforded a useful analogy, and continued: "It is only trade refuse if the trade directly makes the refuse, and not if the trade only increases the quantity of the household or domestic refuse. So I think a supply of water is not a supply 'for' a trade or business unless it is supplied to be used actually and directly in the trade. It is trade use of water, and not increase caused by trade of domestic use of water, which is put by s. 25 outside of domestic purposes. I think the authorities all shew this, particularly perhaps the judgment of Kennedy L.J. in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (4) in the

(1) [1911] 2 K. B. 38; [1912] A. C. 24.
(2) [1902] 1 K. B. 310.
(3) [1913] 2 K. B. at p. 268.
(4) [1911] 2 K. B. 38.

Court of Appeal, which was approved in the House of Lords. To be a trade supply the water must be, as it were, the raw material of the trade, as in the case of a mineral water manufacturer who actually sells the water after having treated it and made it into soda water or other mineral water, or it must be the stock in trade of the business, if there be such a case, possibly the case of a bath proprietor may be one, or it must be an implement or instrument used in the business, as water for a steam engine (which case however is expressly provided for), or for hydraulic machinery, or probably for a laundry or for a dyer's and cleaner's business. There is in such cases a direct use of the water for trade purposes, and the trade is not merely the causa sine qua non, but the direct cause of the water supply." I wish to say with reference to that passage, though I do not in the least say that it is wrong, that it is a statement which is manifestly not covered by the decision of the House of Lords in *Colley's Patents Case* (1), and is something beyond what was said there. The House of Lords do not say anything about it being necessary for trade purposes that the water should be a "raw material of the trade," or the other things which are mentioned. I desire to make one other remark. I thought at one time that our decision would possibly cause injustice in a case where the user of water was considerably increased by reason of the trade carried on in the licensed house, but the explanation given by Mr. Ryde has satisfied me that it will not practically work any injustice at all.

I have referred in some detail to the judgments of the learned judges in order to shew the grounds upon which they proceeded. The conclusion I have come to is that the decision of the Divisional Court is right. At the same time I wish to say once again that the question before us is not so obviously within the decision of the House of Lords as to make that decision conclusive of this case. In my opinion the appeal should be dismissed.

BUCKLEY L.J. In the Divisional Court Channell J. in the course of his judgment said (2): "It is trade use of water, and not increase caused by trade of domestic use of water, which is put

(1) [1912] A. C. 24. (2) [1913] 2 K. B. at p. 268.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

Buckley L.J.

by s. 25 outside of domestic purposes." With that sentence I agree; and in those few words I think is contained the principle on which this case should be decided.

The question arises upon s. 25 of the Metropolitan Water Board (Charges) Act, 1907. I find that in ss. 7, 8, and 9 the Act contains certain provisions regarding the supply of water for domestic purposes, and in s. 16 for the supply of water for purposes other than domestic. Sect. 32 also deals with the supply of water for other than domestic purposes. In this connection is s. 25, which is said by the marginal note to be one defining domestic purposes. That section contains no definition at all. It merely says that for the purposes of this Act two particular users shall be and certain other users shall not be domestic. There may be many more users of the first class, and many more of the second class, but whether any particular user falls within the one class or the other the reader is left to determine for himself by ascertaining as well as he can the meaning of the words "domestic purposes" without the assistance of a definition. Looking more closely at the section, I find that it is necessary, in order to give effect to what appears to be its meaning, to read the language with some modification to make it intelligible. The section speaks of a water closet as a domestic purpose. A water closet is not a purpose at all. In order to understand the section, I must read it as if it ran: "In and for the purposes of this Act the expression 'supply of water for domestic purposes' shall be deemed to include a supply of water for water closets and baths," and so on. Then the latter part of the section falls in quite properly, "but shall not include a supply of water for any of the following purposes" (inter alia) "any trade, manufacture, or business." In dealing with this section therefore I have to see whether the supply of water has been furnished for domestic purposes, or for purposes which are not domestic; and in this particular case whether it has been furnished for the purposes of a trade, manufacture, or business. I have to inquire what is the character of the purpose for which the water is used; not what is the character of the premises in which the water is used, or the character of the person using it. Upon these premises is carried on, on a very small scale, nothing like the scale of an ordinary

restaurant, the business of cooking and supplying food. The water in question is used for the purposes of cooking and of washing the dishes after cooking and for like purposes. It cannot be disputed that these purposes as purposes are domestic. But the existence of the trade causes an increased demand for water for those domestic purposes. The question then is whether water, supplied for the purposes of the trade of a restaurant keeper, when it is only supplied to meet an increased domestic demand caused by the trade, is supplied for the purposes of the trade. In my opinion it is not supplied for the trade as distinguished from supply for domestic purposes. It is supplied to satisfy an increased demand for domestic purposes. That increased demand would, no doubt, not arise if the trade were not carried on, but nevertheless the water is supplied for a domestic purpose. The premises are trade premises, but the inquiry is not whether the premises are used for a trade, but whether the water is used for a domestic purpose in premises in which a trade is carried on.

Many authorities have been referred to. In *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1) the premises were a boarding-house; in *South-West Suburban Water Co.* v. *St. Marylebone Union* (2) a school; in *Frederick* v. *Bognor Water Co.* (3) a boarding school; in *South Suburban Gas Co.* v. *Metropolitan Water Board* (4) gasworks; and in *Metropolitan Water Board* v. *Colley's Patents* (5) a factory for manufacturing railway tickets. The premises were in each case premises upon which a trade or business was carried on. In all those cases it was held that the water was supplied for domestic purposes and not for purposes of trade. They were not all of them under the Metropolitan Water Board (Charges) Act, 1907; some were under earlier special Acts of Parliament.

There are two cases in which the result was different. The first is *Barnard Castle Urban Council* v. *Wilson.* (6) That was the case of a school. The school had the advantage of

(1) [1902] 1 K. B. 310.
(2) [1904] 2 K. B. 174.
(3) [1909] 1 Ch. 149.
(4) [1909] 2 Ch. 666.
(5) [1911] 2 K. B. 38; [1912] A. C. 24.
(6) [1901] 2 Ch. 813; [1902] 2 Ch. 746.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

Buckley L.J.

possessing a swimming bath. The case was heard by myself when I was a judge of first instance. Counsel for the plaintiffs made an admission, although I was sorry that he did, that a supply of water for a swimming bath in a private house would be a supply for a domestic purpose. In those circumstances I thought the fact that the house was a school and not a private residence made no difference, and that the supply was for a domestic purpose. In the Court of Appeal Mr. Upjohn, who had not appeared in the Court below, argued the case for the plaintiffs. He made no admission in the Court of Appeal, and the Court arrived at the conclusion that the swimming bath was not a mere domestic appendage of the school, but was educational and was used for the purposes of education. That being so, totally different considerations arose, and in those circumstances the user was held not to be domestic. The other case is *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1), where the question arose as regards sanitary conveniences at a railway station. They were held to be within the words "railway purposes" in s. 25 of the Metropolitan Water Board (Charges) Act, 1907. There there was no domus; and the purposes were not domestic but railway purposes. Those are the authorities, and they all point, in my opinion, in one direction. Counsel for the defendant has said, and I think with truth, that the decision in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) must be taken to have been present to the mind of the Legislature and approved when the Act of 1907 was passed. That case in substance decided this, that to satisfy a domestic purpose for reward leaves it a domestic purpose. That is the point which arises here. A public-house keeper satisfies a domestic purpose by cooking and supplying food, and takes payment for it; but the use of the water in the cooking is a domestic use. It is true that in *Pidgeon's Case* (2) the learned judges referred repeatedly to the fact that the water was used for the inmates of the house. That, I think, makes no difference. It does not matter whether a man is an inmate under a tenancy for seven years, or whether he is spending six weeks' holiday there, or is there for a week end, or whether

(1) [1910] 1 K. B. 804; [1910] 2 K. B. 890. (2) [1902] 1 K. B. 310.

he has simply gone there to have his lunch. There are two cases in which it was important for the Metropolitan Water Board to maintain, and they successfully maintained, that they were entitled to be paid a percentage upon the rateable value of the premises. They are *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) and *Metropolitan Water Board* v. *Colley's Patents, Ld.* (2) In neither of those two cases did any persons reside on the premises, but nevertheless the user was held to be domestic, because there was not a trade use of the water. Residence, therefore, I think has nothing to do with it. The principle of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3) seems to me to be applicable to this case. In my opinion that case was well decided, and the principle of it was accepted by the Act of 1907, and governs this case.

Three cases as to trade refuse have been referred to which by way of analogy are useful for consideration in the determination of the present case. They are *Vestry of St. Martin's* v. *Gordon* (4), *Westminster Corporation* v. *Gordon Hotels, Ld.* (5), and *Lyons & Co.* v. *London Corporation.* (6) They are cases in which the question was whether refuse of an hotel in the first two cases and of a restaurant in the third case was trade refuse or house refuse. The decision, stated quite shortly, was that the test is not whether the refuse arises in the course of a trade, but whether it is in its nature house refuse or trade refuse. Similarly the test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic. The contention of the plaintiffs really seeks to establish that every trade purpose, even though it is domestic in its nature, is a non-domestic purpose. In my opinion that is erroneous. It must first be ascertained whether the user of the water is or is not domestic, and if it is found that it is domestic, the result is not altered by the fact that an increased demand for water is created by reason of the existence of a trade. I think that this appeal fails and must be dismissed.

(1) [1909] 2 Ch. 666.
(2) [1911] 2 K. B. 38; [1912] A. C. 24.
(3) [1902] 1 K. B. 310.
(4) [1891] 1 Q. B. 61.
(5) [1906] 2 K. B. 39.
(6) [1909] 2 K. B. 588.

C. A. 1913

METROPOLITAN WATER BOARD v. AVERY.

HAMILTON L.J. In my opinion the question in this appeal is concluded by authority, certainly by the judgment of this Court in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (1), and, as I read it, by the decision of the House of Lords (2) affirming that judgment. The test laid down in that case by Farwell L.J. and Kennedy L.J., and applied in the present case by the Divisional Court to the question whether the supply of water was for domestic purposes, was that regard must be had to the nature of the user of the water. That test was not only discussed in the Court of Appeal, but it was clearly raised and discussed in the House of Lords. There the water was not used exclusively for sanitary purposes, although that was the principal user, but was also to some extent used in the trade in connection with cooling tanks attached to a gas engine. Certainly there is no trace in their Lordships' opinions of any dissent from or doubt of the decision of the majority in this Court. We can only adopt that test. In my opinion it has been correctly applied by the Divisional Court. This appeal therefore fails.

Appeal dismissed.

Solicitor for plaintiffs: *Walter Moon.*
Solicitors for defendant: *Maitlands, Peckham & Co.*

(1) [1911] 2 K. B. 38. (2) [1912] A. C. 24.

W. F. B.

HAMMOND BROTHERS AND CHAMPNESS, LIMITED *v.* JACKSON.

1913
Nov. 18, 21, 25.

County Court—Practice—Postponement of Trial—"Good cause"—Pendency of Action in High Court raising similar Issue—County Court Rules, 1903 *and* 1904, *Order* XII., *r.* 16.

Order XII., r. 16, of the County Court Rules, provides that " . . . . the Court may, in its discretion . . . . make an order postponing or adjourning for good cause the trial of any action or matter upon such terms, as to costs or otherwise, as may be just":—

Held, that the pendency in the High Court of an action involving practically the same issue as that raised in the county court action may be "good cause" within the above rule entitling the county court judge, in the exercise of his discretion, to postpone the trial of the action in his Court till after the hearing of the High Court action.

APPEAL by the plaintiffs from an order of the Southwark county court judge.

The action, which was commenced on May 15, 1913, was brought to recover 61*l.* 15*s.* 10*d.*, the balance of an account due to the plaintiffs for the erection of a lift at 64, Long Acre to the defendant's order.

On May 21, 1913, the plaintiffs were served by the defendant's solicitors with notice of their intention to apply for an order that the trial of the action should stand over pending the hearing of an action in the High Court against Jackson, the present defendant, at the instance of the A. D. Cab Company. The A. D. Cab Company were the tenants of 64, Long Acre under an agreement with the defendant, who had contracted with them to erect a lift on the premises. By a sub-contract between the defendant and the present plaintiffs the latter erected the lift. The A. D. Cab Company had issued a writ in the High Court claiming damages from the defendant in respect of the alleged faulty construction of the lift.

On May 22, 1913, the county court judge made an order "that the trial of this action be adjourned until after the action of the *A. D. Cab Company* v. *Jackson* [1913 A. 119] now pending in the High Court of Justice has been tried." The order also gave either party liberty to apply.

The plaintiffs appealed.

1913

HAMMOND BROTHERS AND CHAMPNESS, LIMITED v. JACKSON.

C. Doughty, for the plaintiffs. Although the order of the county court judge uses the word "adjourned," in reality the trial has been stayed pending the trial of the other action in the High Court. The pendency of that action is not "good cause" within Order XII., r. 16, of the County Court Rules for staying the present action. The effect of the order is to deprive the plaintiffs for an indefinite time of their right to receive payment for their work in the erection of the lift.

E. F. Lever, for the defendant. There was "good cause" for adjourning the trial of this action, as the two actions involve practically the same issue, namely, the efficiency of the work in the erection of the lift. Sect. 106 of the County Courts Act, 1888, says that "The judge . . . . may from time to time adjourn any court, or the hearing or further hearing of any action or matter, in such manner as the judge may think fit." That language is very wide, as is also the language of Order XII., r. 16, and a complete discretion is given to the judge to adjourn the hearing of an action.

C. Doughty in reply. "Good cause" must be something which has relation to both parties to the action in the county court, and the view of the judge should be limited to matters arising in his own Court. The present plaintiffs are not concerned with the dispute between the A. D. Cab Company and the defendant, and, there being two contracts, it is possible that the plaintiffs may properly succeed in the county court and that Jackson may properly fail in the High Court action.

Cur. adv. vult.

BRAY J. This is an appeal by the plaintiffs from an order made by the county court judge that the trial of the action should be postponed until the High Court action of *A. D. Cab Company* v. *Jackson* has been decided. For the plaintiffs it is said that there was no "good cause" within Order XII., r. 16, of the County Court Rules for postponing the trial. By that rule it appears to be made a condition precedent that there shall be "good cause" before the judge makes an order for the postponement of the trial of any action. The "good cause" alleged in this case was that there was pending in the High Court an action

1913

HAMMOND BROTHERS AND CHAMPNESS, LIMITED v. JACKSON.

Bray J.

which raised practically the same point as that raised in the county court action. In my opinion that was "good cause." It is always difficult to distinguish between what is "good cause" and what is a matter for the discretion of the judge, but I think the pendency of an action, which may be between other parties, in which the same question will probably be tried, is a matter entitling the judge, in the exercise of his discretion, to make an order for the postponement of the trial. The discretion must no doubt be a judicial discretion, but in this case I cannot say that the judge did not consider the point, and whether the order he made was right or wrong, I cannot say that he did not exercise his judicial discretion. It seems to me therefore that the appeal fails, but I think I ought to say that in my opinion the judge in the exercise of his discretion should not have made the order he did. There are two actions pending, and the plaintiffs' action would have come on for trial first, and it is a hardship on them to be obliged to wait till the same issue has been decided in an action between other parties at the trial of which they will have no right to take any part. I think that if the judge reconsiders the matter he will perceive this hardship, for it is quite clear that the question between the A. D. Cab Company and Jackson depends upon one agreement and the question between the present plaintiffs and Jackson depends upon another agreement and it may be a different one. The judge properly gave liberty to apply, and I suggest that the plaintiffs might fairly apply now to the judge to reconsider the whole circumstances, and more particularly the fact that the action at the instance of the A. D. Cab Company against Jackson is unlikely to be heard for some little time. In view of those circumstances perhaps the judge will consider it right to allow the trial of this action to proceed, which in my view should now proceed.

LUSH J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Sewell, Edwards & Nevill.*
Solicitors for defendant: *J. Deacon Newton & Co.*

J. S. H.

1913
Nov. 4.

BELSIZE MOTOR SUPPLY COMPANY *v.* COX.

[1913 B. 2123.]

Sale of Goods—Hire and Purchase—Contract or Option to buy—Pledge—Conversion—Measure of Damages—"Person having agreed to buy"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2.

By s. 25, sub-s. 2, of the Sale of Goods Act, 1893, where a person having . . . . agreed to buy goods obtains, with the consent of the seller, possession of the goods . . . . the delivery or transfer by that person . . . . of the goods . . . . under any . . . . pledge . . . . to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . . with the consent of the owner.

By an agreement in writing the owners of a motor vehicle let it to certain hirers for twenty-four calendar months at the rate of 15*l.* 12*s.* 2*d.* per calendar month. On the signing of the agreement the hirers were to pay, and did pay, 50*l.* on account of hire in advance, and each subsequent payment was to be made in advance on specified dates. The hirers were not to relet, sell, or part with the vehicle without the consent in writing of the owners. If the hirers should on or before the expiration of the twenty-four calendar months be desirous of purchasing the vehicle they could do so by making the amount of hire paid equal to the amount of 424*l.* 11*s.* 6*d.* If the hirers did certain things, of which parting with the possession of the vehicle without the owners' consent in writing was one, it was made lawful for the owners and they were authorized to take possession of the vehicle and terminate the agreement.

During the currency of this agreement, there being a sum due and unpaid on account of hire, the hirers, without the consent of the owners, pledged the vehicle to a pledgee who took it in good faith and without notice of the owners' rights. Subsequently the owners, hearing of the pledge, demanded the vehicle from the pledgee, who refused to restore it. At the date of this demand and refusal there was a sum of 58*l.* 9*s.* due and unpaid on account of hire.

In an action by the owners against the pledgee:—

Held, that the effect of the agreement was that, having paid twenty-four instalments, the hirers had an option either to become purchasers of the vehicle or to return it and claim back the 50*l.* paid in advance, and that the agreement did not impose upon them an obligation to purchase the vehicle; that consequently the hirers were not persons "having agreed to buy" the vehicle within the meaning of s. 25,

sub-s. 2, of the Sale of Goods Act, 1893, and that the pledgee took no better title than the hirers had.

Helby v. *Matthews* [1895] A. C. 471, followed.

Lee v. *Butler* [1893] 2 Q. B. 318, distinguished.

Held, also, that the pledgee had an interest in the vehicle, and that therefore the measure of damages was not the full value of the vehicle but was only the value of the owners' interest therein, i.e., the amount of hire and purchase money remaining unpaid.

Brierly v. *Kendall* (1852) 17 Q. B. 937; *Chinery* v. *Viall* (1860) 5 H. & N. 288; and *Johnson* v. *Stear* (1863) 15 C. B. (N.S.) 330, applied.

TRIAL of action before Channell J. without a jury.

By an agreement in writing dated December 10, 1910, and made between the Belsize Motor Supply Company, therein called the owners, of the one part, and the Motor Manufacturing Company and Alfred Burgess, Limited, therein called the hirer, of the other part, it was agreed as follows:—

"1. The owners agree to let and the hirer agrees to hire a Belsize motor taxi-cab No. 2920 for the term of twenty-four calendar months from the date hereof at the rate of fifteen pounds twelve shillings and two pence per calendar month.

"2. The hirer shall on the signing hereof pay 50*l.* on account of hire in advance and each subsequent payment in advance on the first day of each month during the currency of this agreement the first of such subsequent payments to become due on January 10 next and each monthly payment shall be paid to the owners or their agents the Belsize Motors, Limited, within seven days after it becomes due without any previous application being made to the hirer for it.

"3. If any accident should happen or any repairs be required to the said motor taxi-cab the same shall be made good by the hirer at his own cost and to the satisfaction of the owners or their agents the Belsize Motors, Limited, and the hirer agrees to keep such motor taxi-cab fully insured against fire and accident and to apply for and take out and pay for all licences that may be requisite during the time the motor taxi-cab is in his possession and to produce the policy and the last premium receipt and licence and all renewals thereof to the owners or their said agents on request.

1913

BELSIZE MOTOR SUPPLY COMPANY v. COX.

"4. The hirer shall not relet sell or part with the possession of the said motor taxi-cab or remove it from 3 The Mall, Church End, Finchley, N. without the previous consent in writing of the owners or their said agents.

"5. If the hirer should on or before the expiration of the aforesaid period of twenty-four calendar months be desirous of purchasing the said motor taxi-cab he shall be at liberty so to do by making the amount of hire paid on this account equal to the sum of four hundred and twenty-four pounds eleven shillings and six pence without any deduction whatsoever and if the hirer shall be desirous of purchasing the said motor taxi-cab at the end of twelve months he shall be at liberty to do so by making the amount of hire paid on this account equal to the sum of 424*l.* 11*s.* 6*d.* four hundred and twenty-four pounds eleven shillings and six pence without any deduction whatsoever.

"6. Should the hirer make default in payment of the hire for one calendar month after it becomes due or should he become bankrupt or insolvent or execute any deed of assignment of his property for the benefit of his creditors or make any composition with his creditors or allow judgment to be obtained against him or distraint for rent be levied which is not immediately satisfied or sell or dispose of his business or commit any breach of clauses 3 or 4 hereof it shall be lawful for the owners or their said agents and they are hereby authorized to take possession (forcible if necessary and for this purpose to break open doors) of the said motor taxi-cab and terminate this agreement and the moneys then in the hands of the owners or their said agents by virtue hereof whether by way of hire or otherwise shall be forfeited by the hirer and become the absolute property of the owners."

In breach of paragraph 4 of this agreement the Motor Manufacturing Company and Alfred Burgess, Limited, pledged the taxi-cab to the defendant upon the terms of an agreement in writing dated August 29, 1911, and made between that company and Thomas Cox, the defendant. This agreement recited that the company had on August 28, 1911, deposited at the Cadogan Garage, Sidney Street, Chelsea, at their risk with the said Thomas Cox the goods comprised in the schedule thereunder

written as security for the payment of the sum of 300*l.* paid by the said Thomas Cox to the said company (the receipt whereof the company acknowledged) and for the payment of the sum of 60*l.* for interest; and that the company had agreed to pay to the said Thomas Cox the sum of 300*l.* and 60*l.*, making together 360*l.*, on September 28 then next. The agreement contained the following among other terms:—"In case of default in payment the said Thomas Cox after three days' notice in writing delivered at the last known address of the company may sell the said goods by auction or otherwise and apply the proceeds of the sale in or towards the payment of any money which may be due under this agreement and of the expenses of and consequent on such sale but until such default is made no such sale is to take place nor is any action or suit to be brought to enforce payment of the said sum of three hundred pounds and interest And the said company hereby agrees that if the goods be sold and do not realize sufficient to pay the amount then due under this agreement and the costs and expenses they will forthwith pay to the said Thomas Cox whatever sum may remain owing on this agreement with interest thereon until such payment at the rate of twenty per centum per month . . . ."

The schedule included the motor taxi-cab the subject of this action.

At the date of this agreement there was due to the plaintiffs from the company a sum in respect of the hire of the taxi-cab after giving credit for the 50*l.* paid on account of hire in advance. In May, 1913, the sum due from the company being unpaid to the extent of 58*l.* 9*s.*, the plaintiffs made inquiries and discovered that the motor taxi-cab had been pledged to the defendant under the agreement of August 29, 1911. On June 7, 1913, they wrote to the defendant, and on June 9 the plaintiffs' representative called upon the defendant and demanded the return of the cab. The defendant refused to return the cab. On June 13 the plaintiffs issued a writ demanding a return of the cab or its value and damages for its detention.

The defendant in his defence said that he received the cab from the Motor Manufacturing Company and Alfred Burgess, Limited, in good faith and without notice of any claim, lien, or

1913

BELSIZE MOTOR SUPPLY COMPANY v. COX.

right on the part of the plaintiffs, and that, the said Motor Manufacturing Company and Alfred Burgess, Limited, having bought or agreed to buy the said taxi-cab from the plaintiffs, the defendant relied upon s. 9 of the Factors Act, 1889, and s. 25 of the Sale of Goods Act, 1893. (1)

J. B. Matthews, K.C., and *G. F. Spear*, for the plaintiffs. The effect of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, is that if a person "having agreed to buy" goods obtains, with the consent of the seller, possession of the goods, the delivery by that person of the goods under a pledge confers a good title on the pledgee. Therefore, if the agreement of December 10, 1910, was an agreement to buy the motor taxi-cab, then the Motor Manufacturing Company and Alfred Burgess, Limited, the hirers under that agreement, who for brevity may be called the Burgess Company, did by the agreement of August 29, 1911, pass a good title to the defendant as pledgee. The question whether the agreement of December 10, 1910, was an agreement to buy depends upon whether it imposed on the Burgess Company an obligation to buy or only conferred on them an option to buy the taxi-cab. If it imposed an obligation, it was an agreement

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25, sub-s. 2: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . . of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Sub-s. 3: "In this section the term 'mercantile agent' has the same meaning as in the Factors Acts."

Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2: "(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

to buy: *Lee* v. *Butler* (1); *Hull Ropes Co.* v. *Adams* (2); *Thompson and Shackell* v. *Veale* (3); *Wylde* v. *Legge*. (4) If it merely conferred an option, it was not an agreement to buy: *Helby* v. *Matthews*. (5) In that case the Burgess Company by the pledge conferred no better title on the defendant than they had themselves.

The agreement of December 10, 1910, did not bind the Burgess Company to buy the cab. By clause 5 they might, if they wished to, buy it by paying 424*l*. 11*s*. 6*d*. at any time before the expiration of twenty-four months from the date of the agreement. Further, if, having paid the sum of 50*l*. in advance, they had subsequently paid all the twenty-four instalments of 15*l*. 12*s*. 2*d*., amounting to 374*l*. 12*s*., they might then refuse to take the cab and might demand a return of the 50*l*. There may have been a strong inducement to the hirers, but there was no duty upon them, to buy the cab. That being so, they could only pass to the defendant such title as they had; and, as they had broken the terms of clause 4 of the agreement of hiring, they had no title as against the plaintiffs. It follows that the defendant has no title and the plaintiffs are entitled to judgment.

Ivor Bowen, K.C., and *S. Duncan*, for the defendant. The agreement of December 10, 1910, was an agreement to buy and the Burgess Company were "persons having agreed to buy" within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and within the principle of the decisions of *Lee* v. *Butler* (1) and the cases which followed it. The clause on the strength of which the House of Lords decided *Helby* v. *Matthews* (5) is absent from this agreement. That clause was "The owner agrees that the hirer may terminate the hiring by delivering up to the owner the said instrument." There is no such clause in this agreement. By clause 1 the hirers agreed to hire for twenty-four months at the rate of 15*l*. 12*s*. 2*d*. per month and to pay the 50*l*. on account of hire in advance. That makes up the full purchase-money. There is no provision that the hirers can claim the 50*l*. When they have paid the purchase-money they are entitled to the

(1) [1893] 2 Q. B. 318.
(2) (1895) 65 L. J. (Q.B.) 114.
(3) (1896) 74 L. T. 130.
(4) (1901) 84 L. T. 121.
(5) [1895] A. C. 471.

1913

BELSIZE MOTOR SUPPLY COMPANY v. COX.

cab; if they do not choose to take it that does not turn their obligation to pay into an option.

[CHANNELL J. If the plaintiffs are entitled to judgment, what is the measure of damages? Where the defendant has an interest in chattels converted the measure of damages is not the full value of the chattels, but the value of the plaintiff's interest in them: *Brierly* v. *Kendall* (1); *Chinery* v. *Viall* (2); *Johnson* v. *Stear*. (3)]

The plaintiffs cannot recover more than the amount remaining unpaid, that is 58*l*. 9*s*. The breach, if any, of clause 4 of the agreement of December 10, 1910, does not ipso facto revest the property in the plaintiffs. By clause 6 they were authorized to take possession; but until they did so, possession was rightfully in the hirers, and they lawfully could and did transfer it to the defendant.

Matthews, K.C., in reply. The Burgess Company had no title which they could transfer to the defendant. Having broken the contract of bailment they divested themselves of all property in the cab. The whole property revested in the plaintiffs. Consequently neither the Burgess Company nor the defendant can resist a claim in conversion for the full value of the cab.

CHANNELL J. The first question is whether this case comes within the principle of *Helby* v. *Matthews* (4) or that of *Lee* v. *Butler* (5) and later cases of the same class. To decide that question I have to see whether in this agreement of December 10, 1910, the Burgess Company, the original hirers, bound themselves to buy the motor cab. The case of *Lee* v. *Butler* (5), which was not dissented from in *Helby* v. *Matthews* (4), decided that where the hirer has agreed to pay all the instalments of purchase-money that amounts to an agreement to buy, and the case comes within s. 9 of the Factors Act, 1889, or s. 25 of the Sale of Goods Act, 1893. In *Helby* v. *Matthews* (4) it was decided that, as the hirer had an option to return the goods, the case did not come within the sections. When those cases had been decided the

(1) 17 Q. B. 937.
(2) 5 H. & N. 288.
(3) 15 C. B. (N.S.) 330.
(4) [1895] A. C. 471.
(5) [1893] 2 Q. B. 318.

case of *Hull Ropes Co.* v. *Adams* (1) came before a Divisional Court. No report of *Helby* v. *Matthews* (2) had as yet been published in the *Law Reports*, and the Court reserved judgment until a report should appear. Having seen the report they decided that the facts in *Hull Ropes Co.* v. *Adams* (1) did not bring the case within the decision of *Helby* v. *Matthews*. (2) There is no conflict between these cases. Where the agreement contains an obligation to pay the purchase-money it is an agreement to buy. In the present case there is a positive obligation to pay twenty-four instalments of 15*l.* 12*s.* 2*d.* That amounts to 374*l.* 12*s.* There was also an obligation to pay on the signing of the agreement the sum of 50*l.* "on account of hire in advance." If 374*l.* 12*s.* had been the entire sum which would have been necessary to enable the hirer to say that the cab was his property, the agreement would have been an agreement to purchase within the principle of *Lee* v. *Butler* (3); but 374*l.* 12*s.* was short of the entire purchase-money by the exact sum of 50*l.* (4) If the hirers had both paid the 50*l.* and all the twenty-four instalments they would have paid up the full amount required to purchase the cab; but the 50*l.* would have been paid as deposit on account of purchase-money in advance. The document on the face of it gives the hirers an option to purchase at any time by paying up the difference between 424*l.* 11*s.* 6*d.* and the sum already paid. That is an option which no doubt the hirers would probably exercise unless it proved valueless, but it is none the less an option when they had paid the twenty-fourth instalment to decline to proceed with the purchase, and to claim a return of the 50*l.* deposit. In my view they were never bound to pay more than 374*l.* 12*s.* They never bound themselves to pay the whole sum of 424*l.* 11*s.* 6*d.* The case therefore comes within the principle of *Helby* v. *Matthews* (2) and not within *Lee* v. *Butler*. (3)

The second point in the case is more doubtful. Does this case come within the exception to the general rule that in an action for conversion the measure of damages is the value of the goods

(1) 65 L. J. (Q.B.) 114.

(2) [1895] A. C. 471.

(3) [1893] 2 Q. B. 318.

(4) Both parties ignored as being immaterial the difference between 424*l.* 12*s.* (i.e., 50*l.* + 374*l.* 12*s.*) and the figure 424*l.* 11*s.* 6*d.* specified as the purchase price in clause 5 of the agreement of December 10, 1910.

1913

BELSIZE MOTOR SUPPLY COMPANY v. COX.

Channell J.

and chattels converted? There is an exception to that rule where the defendant has an interest in the goods and chattels converted; then the measure of damages is the value of the plaintiff's interest as between himself and the defendant. This exception has often been recognized, for example, in *Brierly* v. *Kendall* (1), *Chinery* v. *Viall* (2), and *Johnson* v. *Stear*. (3) I am not aware of any binding authority applying this exception to a case where the rights of the parties depend upon a hire and purchase agreement. The defendant is not himself the original bailee, but is a third person deriving title from the original bailee. In the present case he is a pledgee. A pledgee or purchaser takes such title as his pledgor or vendor has, and here, whether the pledge to the defendant was rightful or wrongful (in this case it was wrongful), yet the defendant thereby acquired such rights as the Burgess Company, the original hirers, had. He might have completed his title as against the plaintiffs by tendering the amount of the purchase-money remaining unpaid by the Burgess Company. In the view I take of the agreement of December 10, 1910, the hirers did not lose their right to purchase the cab merely by making default in the payment of the instalments. That default did not ipso facto determine the bailment. On default clause 6 of the agreement gives the plaintiffs an option to take possession of the cab and to terminate the agreement. That option has to be exercised, otherwise the agreement continues in force; until it is exercised the right of the hirers subsists to pay all the purchase-money and acquire the property in the cab. This construction makes clauses 5 and 6 hang together. If this be the true view of the agreement, then the defendant has acquired an interest in the cab, and, that being so, the proper judgment will be for the amount remaining unpaid, which I understand is 58*l.* 9*s*. There will be judgment for the plaintiffs for that amount.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Richard Furber & Sons.*

Solicitors for defendant: *Humphrey Phillips & Co.*

(1) 17 Q. B. 937. (2) 5 H. & N. 288.

(3) 15 C. B. (N.S.) 330.

W. H. G.

COOPER, Appellant *v.* SWIFT, Respondent.

1913
Nov. 12.

Rag Flock Act, 1911 (1 & 2 *Geo.* 5, *c.* 52), *s.* 1, *sub-s.* 1—"*Rags*"—*Meaning.*

Sect. 1, sub-s. 1, of the Rag Flock Act, 1911, prohibits the sale of flock manufactured from rags, unless the flock conforms to a standard of cleanliness prescribed by regulations made by the Local Government Board:—

Held, that the word "rags" in this section is not limited to rags which have become polluted through having been used in association with human or animal life, and that it includes cuttings from woven jute fabric cut away as waste in the process of manufacture.

Case stated by a metropolitan police magistrate.

The respondent was summoned to answer a complaint by the appellant for that he did unlawfully sell flock manufactured from rags which did not conform to the standard of cleanliness prescribed by the Local Government Board. (1)

The appellant, an inspector in the employment of the Bedding and Allied Trades Association, Limited, having laid an information, a summons was issued returnable against Messrs. Dawson Brothers, of 119—149, City Road, E.C.

The said defendants in pursuance of s. 1, sub-s. 3, of the Act alleged that the flock cushions concerning which the

(1) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery cushions or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board and if any person sells or uses or has in his possession flock in contravention of this Act he shall be liable on summary conviction to a fine not exceeding in the case of a first offence ten pounds or in the case of a second or subsequent offence fifty pounds."

In pursuance of the Act by an Order of the Local Government Board dated June 8, 1912, it was provided that: "Flock shall be deemed to conform to the standard of cleanliness for the purpose of sub-section (1.) of section 1 of the Act when the amount of soluble chlorine in the form of chlorides removed by thorough washing with distilled water at a temperature not exceeding 25 degrees centigrade from not less than 40 grammes of a well mixed sample of flock does not exceed 30 parts of chlorine in 100,000 parts of the flock."

1913

COOPER v. SWIFT.

summons had been issued had been purchased by them under warranty from the respondent Swift, and that they took reasonable steps to ascertain, and did in fact believe in, the accuracy of the warranty under which they had so purchased; and in consequence of such allegation the hearing of the summons against Dawson Brothers was adjourned and a summons was issued returnable against the respondent L. Swift. Both summonses were by consent heard together.

At the hearing the following facts were admitted or proved:—

Joseph Taylor Cooper, the appellant, on May 2, purchased from Dawson Brothers three cushions sold for use with a chair bedstead. The said cushions were carried from the shop of Dawson Brothers to the office of the association, and the appellant conveyed the said cushions to the office of Harley F. Knight, analyst, at 14, Old Queen Street, Westminster.

Knight opened the cushions, which were stuffed with flock, and took two samples of the flock from each cushion and analysed the samples according to the regulations of the Local Government Board.

The results of the analyses shewed respectively 176, 93, 54, 156, 110, and 167 parts of soluble chlorine per 100,000 parts of flock present in the respective samples, being in each case in excess of the 30 parts of chlorine per 100,000 parts of flock which are allowed under the regulations.

The respondent had purchased the flock contained in the cushions from Messrs. H. E. Kershaw, Limited, the London representatives of the Colnbrook Flock Mills. The flock consisted of jute refuse, such refuse being composed partly of waste fluff from the machines and partly from cuttings from woven jute fabric cut away as waste in the process of manufacture. No part had been otherwise used nor had any part been washed.

It was contended by the appellant that flock composed as aforesaid was flock manufactured from rags within the meaning of the Act.

The magistrate held that such flock was not flock manufactured from rags and dismissed both summonses on that ground. He dismissed the summons against Messrs. Dawson Brothers on the further ground that they had proved the warranty given to

them by the respondent, and that they had taken reasonable steps to ascertain, and did in fact believe in, the accuracy of the said warranty.

The question for the opinion of the Court was whether the magistrate's determination upon the summons against the respondent was correct in law.

Fox Davies, for the appellant. The word "rags" is not defined in the Rag Flock Act, 1911. The definition given in the New English Dictionary is "a small worthless fragment or shred of some woven material." The case finds as a fact that the flock in question consisted, in part, of cuttings from woven jute fabric. The cuttings are rags within the meaning of the Act, and therefore the respondent ought to have been convicted.

R. Moritz, for the respondent. The object of this Act was to prevent the use, in the manufacture of flock, of rags which had become polluted through having been used in contact with human or animal life, and having regard to that object the word "rags" in s. 1, sub-s. 1, of the Act must receive a special interpretation limiting it to rags which have become polluted in the above manner. A piece of fabric which has been cut off from material in the process of manufacture and which has never been used in any way is not a rag within the meaning of s. 1, sub-s. 1, of the Act, although it may be that the flock manufactured therefrom does not conform to the standard of cleanliness set up by the regulations of the Local Government Board.

DARLING J. In this case the respondent was charged with an offence under s. 1, sub-s. 1, of the Rag Flock Act, 1911, which provides that it shall not be lawful for a person to sell flock manufactured from rags, "unless the flock conforms to such standard of cleanliness as may be prescribed" by the regulations made by the Local Government Board. Samples of the flock sold by the respondent were submitted to the test laid down in the regulations and failed to satisfy that test. The magistrate dismissed the charge on the ground that the flock was not flock manufactured from rags within the meaning of the Act, and it is contended on behalf of the respondent that his decision was

1913

COOPER v. SWIFT.

Darling J.

right because the case finds as a fact that the flock consisted of jute refuse which was composed "partly of waste fluff from the machines"—nothing turns on that finding—"and partly of cuttings from woven jute fabric cut away as waste in the process of manufacture." It is admitted that these cuttings are rags in the ordinary sense of the word, but it is contended that they are not rags within the meaning of the Act, because, it is said, nothing however dirty is a rag within the Act unless it has been cut or torn from a piece of material which has been used as a garment and has become foul through contact with the human body. It is sufficient to say that there is no indication in the Act that the word rag as there used was intended to receive that limited meaning. If that had been the intention, one would have expected to find either that a word of so wide an application as rag had not been used, or some indication that only particular kinds of rags were intended to be dealt with by the Act.

Further, I might point out how extremely difficult it would be for the prosecution to make out a case, if the contention of the respondent is right. It would not be sufficient to prove that the flock was manufactured from rags and that the sample did not come up to the prescribed standard of cleanliness. The prosecution would have to prove further that the rags had originally formed part of some material which had been used in contact with the human body and had in that way become polluted and incapable of passing the test. It cannot have been intended that an almost impossible task should be placed upon the prosecution. Without attempting to define what are or are not rags it is sufficient to say that in my opinion the facts stated in the case shew that this flock was manufactured from rags within the meaning of the Act, and the respondent ought therefore to have been convicted.

AVORY J. I am of the same opinion. We have been told that the magistrate acted upon the view which has been contended for in this Court by counsel for the respondent that for the purpose of this Act the rags must be either portions of a garment or some material which has been worn or used by a human being or animal, or portions of a material which after

being detached have been used in that way. In support of this view it is said that the object of the Act was to prevent the danger of pollution arising from materials which have been so used being manufactured into flock. It was also part of the argument that the test laid down in the Local Government Board regulations does not carry out that object, because it is said that the detection of more than 30 parts of chlorine in 100,000 parts of flock does not necessarily prove that the rags have been subjected to animal pollution. If that is so, then the regulations do not carry out the object of the Act, and that might be a good ground for altering them; but I think we must assume that the regulations do carry out the object of the Act, and the only regulation which we have to consider is the one which says that flock shall be deemed to conform to the standard of cleanliness for the purposes of s. 1, sub-s. 1, of the Act when the amount of chlorine removed by washing does not exceed 30 parts of chlorine in 100,000 parts of flock. In this case the analysis proved that there was an excess of chlorine, and I cannot find in the Act any justification for saying that an offence is only committed when the pollution has arisen from the one cause suggested. In my opinion an offence is proved to have been committed when it is shewn that the flock has been manufactured from rags which are in that state of pollution, however caused, that they do not conform to the standard of cleanliness prescribed by the regulations.

ATKIN J. I agree. Counsel for the respondent has argued that the word "rags" in this Act must be read as subject to the limitation that nothing is a rag within the Act unless it has been cut or torn off some material which has previously been used in association with human or animal life. It is not suggested that the degree of pollution prescribed by the regulations can only result from animal pollution, and I see no reason for limiting the meaning of the word "rags" in the Act in the manner contended for by the respondent.

Appeal allowed.

Solicitors for appellant: *Shepheards & Walters.*
Solicitors for respondent: *Cox & Lafone.*

F. O. R.

1913
Oct. 16.

APPLEYARD *v.* BANGHAM.

Motor Car—Building in which Petroleum Spirit for the Purposes of Light Locomotives is kept—User of Building as Dwelling—"Storehouse"—Regulations, dated July 31, 1907, *made under s.* 5 *of the Locomotives on Highways Act,* 1896 (59 *&* 60 *Vict. c.* 36).

By s. 5 of the Locomotives on Highways Act, 1896, "The keeping and use of petroleum or of any other inflammable liquid or fuel for the purpose of light locomotives shall be subject to regulations made by a Secretary of State . . . ."

By s. 7, "A breach of any . . . . regulation made under this Act . . . . may on summary conviction, be punished by a fine . . . ."

By regulation 4 made under the Act, "Where a storehouse forms part of, or is attached to, another building, and where the intervening floor or partition is of an unsubstantial or highly inflammable character . . . . the whole of such building shall be deemed to be the storehouse, and no such storehouse shall be used as a dwelling."

By the definition clause contained in the regulations, "The expression 'storehouse' shall mean any . . . . building . . . . in which petroleum spirit for the purposes of light locomotives is kept in pursuance of these regulations . . . ."

The respondent was tenant of premises which had formerly been a stable, with lofts above it, and the stable had been converted into a motor garage, the lofts being used as dwelling rooms, which were inhabited. The intervening floor between the garage and the dwelling rooms above it was of an unsubstantial character. On January 19, 1913, at 7.25 P.M. there were three motor cars in the garage; one of these had just been driven in, and in the tank of it were seven inches of petroleum spirit. There was a two-gallon can of the spirit with the seal unbroken at the back of the car. One of the other cars had five inches of spirit in its tank, and the tank of the third was practically full. The garage was being used to house the cars for the night:—

Held, that the respondent had "kept" petroleum spirit in a "storehouse" within the meaning of the regulations, and was therefore liable to conviction under the Act for having committed a breach of them.

CASE stated by justices for the borough of Margate.

A summons was issued upon complaint laid by the appellant, who was the Chief Constable of Margate, charging the respondent that on January 19, 1913, at the Cliftonville mews in the borough he did as tenant of the premises unlawfully use the premises

partly as a storehouse for petroleum and partly as dwellings contrary to regulation 4 of the Regulations dated July 31, 1907, made by the Secretary of State in accordance with the provisions contained in s. 5 of the Locomotives on Highways Act, 1896. (1) The following facts were admitted or proved :—

The respondent was tenant of the Cliftonville mews, which had formerly been a stable, with lofts above it. The stable had been converted into and was used as a motor garage, and the lofts had been converted into and used as dwelling rooms for a caretaker and his family (consisting of his wife and two children) and for four other persons, one of them being a chauffeur.

The intervening floor between the garage and the dwelling rooms above it was of an unsubstantial character, consisting merely of an ordinary lath and plaster ceiling, broken in places, with wooden beams across, and had seven shafts in it. The ceiling was at a height of eight feet from the floor of the garage. An ordinary wooden staircase surrounded by a casing of match-boarding communicated with the floor above, and the staircase and casing were in the garage itself.

(1) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 5 : "The keeping and use of petroleum or of any other inflammable liquid or fuel for the purpose of light locomotives shall be subject to regulations made by a Secretary of State, and regulations so made shall have effect notwithstanding anything in the Petroleum Acts, 1871 to 1881."

Sect. 7 : "A breach of any by-law or regulation made under this Act, or of any provision of this Act, may, on summary conviction, be punished by a fine not exceeding ten pounds."

By regulation 2 of the Regulations dated July 31, 1907, made under s. 5 of the Act of 1896, "these regulations shall apply to petroleum spirit which is kept for the purpose of, or is being used on, light locomotives."

By regulation 4, "Where a storehouse forms part of, or is attached to, another building, and where the intervening floor or partition is of an unsubstantial or highly inflammable character . . . . the whole of such building shall be deemed to be the storehouse, and no such storehouse shall be used as a dwelling."

By regulation 5, "The amount of petroleum spirit to be kept in any one storehouse, whether or not upon light locomotives, shall not exceed sixty gallons at any one time."

By the definition clause in the regulations "the expression 'storehouse' shall mean any . . . . building . . . . or other place in which petroleum spirit for the purposes of light locomotives is kept in pursuance of these regulations . . . ."

Regulation 7 provides (inter alia) that "this regulation shall not apply to petroleum spirit kept in a tank forming part of a light locomotive.

1913

APPLEYARD v. BANGHAM.

On January 19, 1913, at 7.25 P.M. there were three motor cars in the garage, one of which had just been driven in, and in the tank of which were seven inches of petroleum spirit, and there was a two-gallon can of petroleum spirit with its seal unbroken at the back of the car. Of the other two cars one had five inches of petroleum spirit in the tank and the other had its tank practically full of petroleum spirit.

The solicitor for the respondent stated that the respondent had on a previous date, but under protest, promised the appellant to cause the petroleum spirit to be emptied from tanks of cars before they were put away in the garage, but had found it impossible to carry out this promise owing to the practical difficulties of getting the tanks emptied, and had therefore given up the attempt. The garage was being used to house motor cars for the night, and the motor cars contained petroleum spirit in their tanks, but the justices did not find as a fact that the garage was being used for the storage of petroleum spirit except in so far as it was stored in the tanks of the motor cars which were housed.

The respondent contended that where the only petroleum spirit in the garage was in the tanks of the motor cars housed there the garage was not a storehouse within the meaning of the regulations.

The appellant contended that as the garage was being used to house motor cars which had petroleum spirit in their tanks it was being used as a storehouse within the meaning of the regulations.

The justices decided in favour of the contention of the respondent and accordingly dismissed the charge.

The question for the opinion of the Court was whether the justices were right in dismissing the charge on the ground stated above.

R. M. Montgomery, for the appellant. The garage is a "storehouse" within the meaning of the regulations. Petroleum spirit is regularly kept there for the night. The definition of "storehouse" in the regulations is a very special and extended one. The decision in *Coleman* v. *Goldsmith* (1) that carrying

(1) (1879) 43 J. P. 718.

petroleum in a cart was keeping it within the meaning of s. 7 of the Petroleum Act, 1871 (34 & 35 Vict. c. 105), and the subsequent passing of the Petroleum Act, 1879 (42 & 43 Vict. c. 47), which by s. 4 directs that the Act of 1871 shall continue in force until otherwise directed by Parliament, shew that the Legislature thought it desirable to prohibit acts of a nature of that which is the subject of the present complaint. The concluding words of regulation 7, "this regulation shall not apply to petroleum spirit kept in a tank forming part of a light locomotive," shew that the other regulations apply to the tank of a motor car. [Regulations 9, 10, and 12 were also referred to.]

The respondent did not appear.

RIDLEY J. I cannot think that the draftsman of the regulations intended that petroleum spirit in the tank of a motor car should be treated as being stored, but the words of the regulations are too strong to enable us to hold otherwise, and the case must be remitted to the justices with a direction to convict.

SCRUTTON J. In this case I have not felt the difficulty which my learned brother has and I am not pressed by the feeling that the spirit of the regulations will be at all infringed by our decision.

The respondent was charged with using certain premises, in a part of which persons live, as a storehouse for petroleum. It is quite clear that persons live in the garage, which is a very flimsy wooden structure, and the question is whether in these circumstances it is a storehouse within the meaning of the regulations. If it is the respondent has infringed regulation 4. The word "storehouse" is defined by the regulations as meaning any room "in which petroleum spirit is kept in pursuance of these regulations." So long as persons do not live in the storehouse sixty gallons of petroleum may be kept there. Regulation 5 says: "The amount of petroleum spirit to be kept in any one storehouse, whether or not upon light locomotives, shall not exceed sixty gallons at any one time." The language of the regulation

1913

APPLEYARD v. BANGHAM.

Scrutton J.

therefore clearly contemplates that petrol may be kept in a storehouse, either on light locomotives or not on light locomotives—that is to say that if there are fifty-nine gallons placed in a corner of the warehouse there must be added to it two gallons or whatever the quantity may be in the tank of a motor car in order to ascertain whether there is or is not more than sixty gallons. It appears to me that the spirit of the regulations as to this point is that where there are human beings living in a temporary flimsy wooden structure a thing like petrol, in connection with the use of which there is an extreme danger of fire, must not be kept in the same premises in which the human beings are.

Do you "keep" petrol which is in your tanks when you have finished your journey and you put the car away for the night? You keep the car in the garage. Do you also keep the contents of the car in the garage? I should have thought, but for the doubt that my learned brother feels, that there was no difficulty in saying that, just as you keep the car in the garage, you keep the petrol in the garage, whether the petrol was in the tank of the locomotive, as part of the petrol was in this case, or was in a can as some other petrol was.

I agree the case must go back to the justices with a direction to convict.

BAILHACHE J. I am of the same opinion. In ordinary language I should not say that I am "keeping" petroleum spirit which is in the tank of a motor car if I am going to take the car out on the next day. The words of the regulations, however, are too strong to enable us to say that the respondent has not committed a breach of them, and the case must be remitted to the justices with a direction to convict.

Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for E. Brooke, Town Clerk, Margate.*

J. E. A.

WILLS *v.* GREAT WESTERN RAILWAY COMPANY.

1913
Nov. 14.

Railway—Carriage of Goods—Special Contract—"Owner's risk"—"Non-delivery of any consignment"—Non-delivery of Part of Consignment.

The plaintiff delivered a consignment of goods to the defendants for carriage on their railway, at a reduced rate, upon the terms of a contract signed by him, which provided that the defendants should be relieved from "all liability for loss, damage, misdelivery, delay, or detention" unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made "within three days after delivery of the goods in respect of which the claim is made, or, in case of non-delivery of any package or consignment, within fourteen days after despatch."

When the consignment arrived at its destination some of the goods were missing, and the plaintiff made a claim upon the defendants within fourteen days after the despatch of the consignment:—

Held, that non-delivery of a part of a consignment was "non-delivery" of the consignment, and not "loss," within the meaning of the contract, and that the plaintiff was entitled to recover damages.

Appeal from the Bristol County Court.

The plaintiff claimed damages for the non-delivery of some carcases of frozen meat, part of a consignment of carcases delivered by him to the defendants for carriage to a station on their railway and there to be delivered to him. When the consignment arrived at that station on the day after despatch it was found that the number of carcases was less than the number which had been delivered to the defendants for carriage. The plaintiff sent to the defendants a claim in writing in respect of these carcases more than three days after the arrival, but within fourteen days after the despatch, of the consignment.

The plaintiff had despatched the consignment at a reduced rate, and had signed an "owner's risk" consignment note in these terms: "Receive and forward the undermentioned goods, to be carried at the reduced rate . . . . , in consideration whereof I agree to relieve the Great Western Railway Company from all liability for loss, damage, misdelivery, delay, or detention . . . . except upon proof that such loss, damage, misdelivery, delay, or

1913

WILLS v. GREAT WESTERN RAILWAY.

detention arose from wilful misconduct on the part of the company's servants. But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage or misdelivery (that is to say):—1. Non-delivery of any package or consignment fully and properly addressed . . . . 2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand . . . . 3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after despatch. Provided that the company shall not be liable in the said cases of non-delivery, pilferage or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

The agreement contained in the consignment note included general conditions printed on the back, clause 3 of which provided: "No claim in respect of goods for loss or damage during the transit, for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after despatch."

The defendants contended that they were exempt from liability upon the grounds: (1.) that non-delivery of a part of a consignment was not "non-delivery of a consignment," but "loss," within the meaning of the contract; (2.) that the consignment was not fully and properly addressed; (3.) that they had proved that the non-delivery of the missing carcases had not been caused by negligence or misconduct on the part of the company or their servants; and (4.) that the claim was not made within three days after the delivery of the consignment to the plaintiff, as required by condition 3. The county court judge held that non-delivery of a part of a consignment was "non-delivery" within the meaning of the contract, and that the claim was properly made within fourteen days after despatch of the consignment; and he found that the consignment was

fully and properly addressed and that the defendants had not proved to his satisfaction that the non-delivery was not caused by negligence or misconduct of their servants. Judgment was accordingly given for the plaintiff. The defendants appealed, with leave. (1)

Schiller, K.C., and *C. K. Tatham*, for the appellants. This was a case of "loss" and not of "non-delivery" within the meaning of the contract, and therefore the defendants are relieved from liability, the plaintiff not having attempted to prove that the loss arose from misconduct of the defendants' servants. The words "non-delivery of any consignment," in the first exception from the exemption from liability, refer only to cases where the whole consignment is not delivered, that is, where there is total failure to deliver. Where there is a partial failure to deliver, that is, where a part of the consignment is not delivered, the case comes within the word "loss." The words "loss" and "non-delivery," in condition 3, bear those meanings. If part only of any consignment is delivered the consignee knows that a part is lost and can make his claim for a loss within three days; but if there is total failure to deliver then he can make his claim within fourteen days after despatch. The contract must be read as a whole and the words "loss" and "non-delivery" have the same meaning in each part of the contract. If "non-delivery" is construed to include the case where only a part of a consignment is not delivered, then no effect at all is given to the word "loss" and it becomes mere surplusage.

M. Shearman, K.C., and *F. E. Weatherly*, for the respondent. It is clear that in condition 3 the word "loss" cannot refer to the case of non-delivery of part of a consignment, for in case of "loss" a claim must be made within three days "after delivery of the goods in respect of which the claim is made," and that cannot apply where some of the goods are not delivered at all. Therefore in that condition "non-delivery" must include the case of non-delivery of part of a consignment. The expression "non-delivery" must bear the same meaning in each part of the

(1) Upon the appeal all these points were argued, but the case only calls for a report upon the point as to the meaning of "non-delivery."

1913

WILLS v. GREAT WESTERN RAILWAY.

contract, and therefore in the earlier part of the contract it means failure to deliver the whole or any part of a consignment. The word "loss" has the wide general meaning which it has in s. 7 of the Railway and Canal Traffic Act, 1854, and may apply to loss arising otherwise than from non-delivery of goods.

C. K. Tatham replied.

BRAY J. In my opinion this appeal must be dismissed. The first point taken is that this is not a case of "non-delivery" within the meaning of this consignment note. In my opinion this clearly was a "non-delivery." The expression "non-delivery" occurs several times in this contract, and I agree that we must look at the whole of the document. I do not say that every word in it is easy to construe. There is a good deal of difficulty in construing the words "loss" and "damage," which may perhaps have a different meaning in different parts of the contract; but I think that there is no substantial difficulty in construing the expression "non-delivery" and that wherever it is used in this contract it has the same meaning. The contract provides, first, that the company shall be relieved from all liability for "loss, damage, misdelivery, delay, or detention," except upon proof of wilful misconduct of the company's servants. If it stopped there, I have no doubt the word "loss" would there include non-delivery; but later on there is an exception in the case of "non-delivery of any package or consignment fully and properly addressed." That seems to shew that "loss" does not include "non-delivery." An additional protection is given in the case of non-delivery. Now, what does "non-delivery" there mean? It is contended by the appellants that "non-delivery of any consignment" does not include non-delivery of a part of a consignment, but must be read as meaning only non-delivery of the whole of a consignment. In my opinion, that is not even the natural meaning of those words. It is the duty of the railway company to deliver the whole consignment, and, if they have only delivered a part, they have not delivered the consignment. Therefore, construed in the strictest sense, it seems to me that "consignment" does not mean only the whole consignment, but that "non-delivery of any consignment"

1913

WILLS v. GREAT WESTERN RAILWAY.

Bray J.

includes non-delivery of part of a consignment. I think this view is confirmed by the mention of package. That was the construction adopted by the learned county court judge, and I think that he was right. Any other meaning would, I think, lead to an absurdity, that is, that this additional protection given to traders in cases of "non-delivery" would not apply unless the whole consignment was lost, and that if the railway company could manage to deliver one bale out of a consignment of 100 bales the trader would not be entitled to this protection.

Of course we must look at the whole of the contract, including the conditions printed on the back. Turning to condition 3, it seems to me to be fairly clear. In the case of "loss or damage during transit" a claim must be made within three days "after the delivery of the goods in respect of which the claim is made." Here the claim is in respect of part of the goods comprised in a consignment and is a claim for non-delivery, and the three days would never begin to run at all if it were a claim for "loss or damage," because the goods in respect of which the claim is made were never delivered. Then follow the words "or, in case of non-delivery of any . . . . consignment, within fourteen days after despatch." That clause confirms the interpretation which I have already put upon the expression "non-delivery," for it first refers to a claim in respect of goods which are delivered and then to a claim in respect of goods which are not delivered, and if a claim is made in respect of non-delivery of part of a consignment of goods it must be a case of "non-delivery" within that condition. That decides the first point, namely, that this was a case of "non-delivery" within the meaning of this contract.

Upon the other points I think that the learned county court judge properly decided that the consignment was fully and properly addressed, and that the defendants had not proved the absence of negligence; and, as I have already said, the provision as to making a claim within three days did not apply, and a claim was made within fourteen days after despatch. This appeal, therefore, fails.

LUSH J. I agree, but I cannot say that I think the case at all a plain one. I think that either view of the meaning of the

1913

WILLS v. GREAT WESTERN RAILWAY.

Lush J.

contract leads to serious difficulties, and I have only come to the conclusion at which I have arrived by looking at and considering the whole of the terms of the contract and considering whether the difficulties involved in the other view are not the more serious and insuperable. One difficulty arises thus. It seems to me that the word "loss," which is the first word used in the exemption contained in the contract, and is also used in condition 3, is either used in two different senses in those two parts of the contract, or, if it is not, is used in a sense contrary to its ordinary meaning and contrary to its meaning in the Railway and Canal Traffic Act, 1854, to avoid the consequences of which these "owner's risk" contracts were adopted. Sect. 7 of that Act made railway companies liable for "loss of" or "injury to" goods caused by negligence and prevented them from protecting themselves by special conditions unless just and reasonable. It seems to me that the meaning of "loss" is there quite plain; it is used in contradistinction to "injury" and denotes the actual loss of the goods themselves.

Now the exemption at the commencement of this contract is from liability for "loss, damage," &c. There the word "loss" seems to me to be clearly used in the same sense in which it is used in s. 7 of the Act of 1854. Indeed this exemption clause deals with every possible case in which the owner of goods has suffered some injury, using that word in a wide sense, owing to the transit of goods on the railway; first, where the goods are lost, that is, have entirely disappeared; secondly, where they have not been lost but have been damaged; thirdly, where they have been given up to some wrong person; and, lastly, where they have simply been delayed or detained and not delivered at the proper time. I should have thought that it is almost impossible to get over the difficulty pointed out by counsel for the appellants, that in this part of the contract, if one considers it alone and without reference to the other terms of the contract, the company are bargaining for a complete indemnity, although the goods are completely lost, which seems to me to be the same as saying although the goods are not delivered. I can see no difference, looking at it from the point of view of the consignee, between goods being lost and being not delivered. But turning to

1913

WILLS v. GREAT WESTERN RAILWAY.

Lush J.

condition 3, and we must try to give effect to the document as a whole, it seems to me that the word "loss" must be used there in some different sense, because, if it is used in the same sense, then this condition says that a claim need not be made in respect of goods which have entirely disappeared until within three days after they have been delivered, whereas if the goods have completely disappeared the owner does not get them at all; and looking at the other alternative in the condition, in the case of "non-delivery of any consignment," a claim must be made "within fourteen days after despatch." Dealing with that condition in order to see in what sense the word "loss" is there used, I have therefore been driven to the conclusion that the contention of the respondent is right. I think that the only possible interpretation to put upon this condition is that the word "loss" is there used in the general sense which the respondent contends that it generally bears in this connection, and that the result is that if the owner gets the goods in a damaged state or suffers a loss from detention or anything of that kind, but does get them, then he has three days after he gets them within which to claim, but that if he never gets part of the goods at all, or does not get any of them, then he has fourteen days from the despatch within which to make a claim. That being so, it follows that the "non-delivery" in the latter part of condition 3 cannot be confined to the case in which no part of the goods is delivered, but must relate to any case in which a part is not delivered, and that "non-delivery of any consignment" means any case in which the whole or any part is not delivered. Such absurd and unreasonable results might follow from adopting the contention of the appellants that I think one must say that "non-delivery of any consignment" bears the same meaning in the exemption part of the contract and in condition 3, and that there is "non-delivery" of a consignment, within the meaning of the contract, not only when the whole of it goes wrong, but also when any part of it is not delivered to the consignee.

In this case there was a partial failure to deliver, an incomplete delivery, and, according to the construction we have put upon the contract, that was a "non-delivery" within the meaning of the contract, and the defendants are liable for the loss of the goods

1913

WILLS v. GREAT WESTERN RAILWAY.

unless they can claim exemption upon some other grounds. I think that we cannot differ from the decision of the learned county court judge upon those other grounds, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *L. B. Page.*

Solicitors for respondent: *Billing & Co., for Fairfax Spofforth, Bristol.*

J. H. W.

1913

Nov. 20, 21.

GRIMBLE & CO. *v.* PRESTON.

Adulteration—False Warranty—Place where Offence committed—Omission to serve Copy of Analyst's Certificate with Summons—Jurisdiction—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2; *s.* 20, *sub-s.* 6.

Where an article of food is sent to a purchaser with a written warranty proceedings for the falsity of the warranty may be taken under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, before justices having jurisdiction in the place where the warranty was received by the purchaser, although it may have been written and attached to the goods in a place outside their jurisdiction.

Non-compliance with the provisions of s. 19, sub-s. 2, of the said Act, which enacts that "In any prosecution under the Sale of Food and Drugs Acts . . . . there must be served therewith"—along with the summons—"a copy of any analyst's certificate obtained on behalf of the prosecutor," does not deprive the justices of jurisdiction to hear the information, but is an informality in procedure only which may be waived by the party charged.

CASE stated by justices for the county of Warwick.

An information was laid by the respondent against the appellants charging that they on February 1, 1913, at the parish of Nuneaton, in respect to an article of food, to wit, malt vinegar, sold by them as principals, unlawfully did give to Ernest Farr, the purchaser, a false warranty in writing that it was pure malt vinegar, contrary to the provisions of s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899. (1)

(1) By s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, "Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing" shall be liable to a penalty "unless he proves to the

Upon the hearing of the information the following facts were proved or admitted:—

The respondent is an inspector appointed by the Warwickshire County Council under the Sale of Food and Drugs Acts. The appellants are vinegar brewers carrying on business in London. On or about February 1, 1913, the appellants delivered by carrier at Nuneaton to one Ernest Farr, a retail grocer, twenty-five gallons of vinegar in casks, each of which casks had a label affixed thereto as follows: "Guaranteed pure malt vinegar—free from added acid—warranted unadulterated. Grimble & Co." The vinegar was delivered in performance of an order given by Farr to the appellants. Farr received by post at Nuneaton on February 1, 1913, from the appellants an invoice for twenty-five gallons of London vinegar, "Guaranteed pure malt vinegar." On or about February 10 the respondent purchased from Farr a pint of the said vinegar as malt vinegar for the purpose of analysis. The formalities prescribed by the Sale of Food and Drugs Acts, 1875 and 1899, were duly complied with. A portion of the vinegar so purchased by the respondent from Farr was at the respondent's instance analysed by the public analyst for the county of Warwick, who gave to the respondent a certificate of his analysis in which he stated that the sample contained at least 30 per cent. of vinegar not derived from malted barley or cereals. On March 7, 1913, the respondent laid an information against the said Ernest Farr under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to him to the prejudice of the purchaser malt vinegar which was adulterated. That information was subsequently withdrawn on proof that Farr had purchased the vinegar under the warranty above mentioned. On May 1 the above-mentioned information against the appellants came on for hearing. It was partly heard on that date and was adjourned at the request of the appellants for the purpose of an analysis of the vinegar being made at Somerset House pursuant to s. 22 of the Sale of Food and Drugs Act, 1875, and s. 21 of the Sale of Food and Drugs Act, 1899. The analysis which was furnished

satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

1913

GRIMBLE & Co. v. PRESTON.

by the chemical officers at Somerset House estimated the proportion of vinegar not derived from malt to be not less than one-third of the sample. On June 12 the hearing was resumed. No witnesses were called or evidence given on behalf of the appellants. No copy of the certificate of the public analyst was served upon the appellants with the summons (1) issued in pursuance of the information laid against them by the respondent. The justices were not satisfied that when the appellants gave the warranty they had reason to believe that the statements in it were true.

It was contended for the appellants, inter alia :—

(*a*) That the justices had no jurisdiction to hear the information because the warranty was not given within the county of Warwick.

(*b*) That as no copy of the public analyst's certificate had been served upon the appellants with the summons in accordance with the provisions of s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, the proceedings against the appellants were bad.

The justices overruled the said contentions and convicted the appellants subject to a case for the opinion of the Court.

Macmorran, K.C., and *Bodkin*, for the appellants. The justices of Nuneaton had no jurisdiction. Whether the warranty is to be found in the labels or in the invoice it was equally given outside their jurisdiction, for the labels were written and attached to the casks and delivered to the carrier for conveyance in London, and the invoice was written and delivered to the post office in London. In *Reg.* v. *Holmes* (2) the prisoner wrote and posted in Nottingham a letter addressed to a place out of England containing a false pretence by means of which he fraudulently obtained money. It was held that the false pretence was made at Nottingham and that there was jurisdiction to try him there. The proper place of trial is where the defendant did the act

(1) By s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, "In any prosecution under the Sale of Food and Drugs Acts the summons shall state particulars of the offence or offences alleged and also the name of the prosecutor . . . . and there must be served therewith a copy of any analyst's certificate obtained on behalf of the prosecutor."

(2) (1883) 12 Q. B. D. 23.

complained of, and here the appellants' share in the sending of the warranty to the purchaser was complete in London.

Secondly, the justices were deprived of jurisdiction by reason of the omission to serve a copy of the analyst's certificate along with the summons as required by s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899. This is a "prosecution under the Sale of Food and Drugs Acts" within the meaning of that section and the case finds that the certificate in question was "obtained on behalf of the prosecutor." No doubt the certificate is not evidence against the wholesale dealer, as it is against the retailer, but that fact does not make the service of it on him useless, for it gives him notice of the precise nature of the complaint and of the particulars in which it is said that his warranty was false. The wholesale dealer may know nothing about the proceedings against the retailer until he is summoned for giving a false warranty.

Clavell Salter, K.C., and *Maddocks*, for the respondent. On the first point the question is where was the warranty given to Farr, the offence being the giving of a false warranty "to the purchaser." It is contended that it was given to Farr when, and not until, it reached him in Nuneaton. Sect. 25 of the Act of 1875 enabled a person who purchased an article of food with a written warranty to set up the warranty as a defence to a prosecution under the Act provided that when he resold it he did so in good faith relying on the warranty being true. It is essential that he should be able to shew the state of his mind at the time of the resale, and he cannot have relied on the warranty unless it had already reached him. The essence of the warrantor's offence is misleading the retail tradesman, and thereby enabling him to escape the penalties that he would otherwise be liable to for selling, however innocently, an article of food not being of the quality demanded by the purchaser. Further the warranty cannot be said to be given to the purchaser so long as the giver of it has a locus pœnitentiæ. If the seller sends out casks with labels bearing a false warranty and before they reach the purchaser repents and removes the labels he cannot be convicted of giving a false warranty to the purchaser, though possibly he may be of affixing false

1913

GRIMBLE & Co. v. PRESTON.

labels to the articles sold contrary to s. 27 of the Act of 1875. In the case of *Reg.* v. *Holmes* (1) not only was the false pretence written in Nottingham, but the money was also received there, and the important part of that particular offence for the purposes of venue is the obtaining of the money.

Further jurisdiction was in any view given to the Nuneaton justices in the present case by s. 46, sub-s. 2, of the Summary Jurisdiction Act, 1879, by which it is provided that "Where the offence . . . . is begun within the jurisdiction of one Court and completed within the jurisdiction of another Court of summary jurisdiction, such offence may be tried by any one of such Courts."

Upon the second point, as to the omission to serve the copy of the analyst's certificate on the appellants, it is contended in the first place that s. 19, sub-s. 2, of the Act of 1899 has no application to such a case as the present. It was only intended to apply to the case of selling an adulterated article to the prejudice of the purchaser, in which case the certificate of the analyst is by s. 21 of the Act of 1875 made prima facie evidence against the seller, and therefore it is reasonable enough that the certificate should be served with the summons. By the "prosecutor," on whose behalf the certificate to be served was obtained, is meant the person who instituted the prosecution in question for the purposes of which he obtained it. But here the certificate was obtained for the purposes of a wholly different prosecution against a different defendant. A prosecution of the giver of a false warranty is not a "prosecution under the Sale of Food and Drugs Acts" within the meaning of that sub-section. But if that view is wrong the objection was one which did not go to the justices' jurisdiction, for the summons was perfectly good, it was only an informality which was capable of being waived, and the appellants in fact waived it. An appearance except for the purpose of taking the objection operates as a waiver. If the defendant allows the case to proceed and takes his chance of getting acquitted he cannot afterwards turn round and say that the procedure was informal.

(1) 12 Q. B. D. 23.

1913

GRIMBLE & Co. v. PRESTON.

Macmorran, K.C., in reply. The service of a copy of the analyst's certificate with the summons was a condition precedent to the justices' jurisdiction, for the omission to serve it, unlike a defect in the summons itself, could not be cured. In *Batt* v. *Mattinson* (1) this very point was so decided. The Court there distinguished the case of *Neal* v. *Devenish* (2), where the defect was in the summons, on the ground that such a defect is capable of amendment under Jervis' Act, "but there are no provisions in the Summary Jurisdiction Act, 1848, making defects as to the time when the summons is returnable, and the default in sending the certificate with the summons, matters which can be amended by adjournment." The non-performance of such a condition precedent cannot be waived. In *Smart* v. *Watts* (3) it was held that the notification required by s. 14 of the Sale of Food and Drugs Act, 1875, to be given by an inspector after the completion of a purchase of his intention to have the article purchased analysed by the public analyst, was a condition precedent to a prosecution under the Act, although there was a contemporaneous admission by the seller that he had committed the offence charged. The objection to jurisdiction may be taken at any stage; it may be taken for the first time even in the Court of Appeal—*Norwich Corporation* v. *Norwich Electric Tramways Co.* (4)—the reason being that it is the duty of the Court to take it. Fletcher Moulton L.J. there said: "The Court is bound to give effect to the objection as soon as the absence of jurisdiction is brought to its notice."

DARLING J. The information in this case charged the appellants with having on February 1, 1913, at the parish of Nuneaton given to one Ernest Farr a false warranty in writing that certain vinegar sold by them to him was pure malt vinegar. The first question is whether under the circumstances of the case the warranty was in fact given at Nuneaton so as to give the justices of that place jurisdiction to entertain the charge. This particular offence is created by s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, which enacts that "Every person

(1) (1900) 64 J. P. 615.
(2) [1894] 1 Q. B. 544.
(3) [1895] 1 Q. B. 219.
(4) [1906] 2 K. B. 119.

1913

GRIMBLE & Co. v. PRESTON.

Darling J.

who in respect of an article of food or drug sold by him . . . . gives to the purchaser a false warranty in writing" shall be liable to a penalty unless he can prove that "when he gave the warranty" he had reason to believe that the statements in it were true. It is clear here that wherever the warranty was begun the giving of it to the purchaser was not complete until it reached him. If a person were to attach a false warranty to goods and put them on the railway, and were subsequently to repent of what he had done, and having got access to the goods while in transitu were to remove the warranty so that it never reached the purchaser, I do not think that he would come within the section. The offence is giving it to the purchaser, and here it was not given to the purchaser until the goods were delivered to him at Nuneaton. Therefore I think that the offence was sufficiently committed in Nuneaton to enable the justices of that place to deal with it. Whether proceedings could also have been taken in London under s. 46, sub-s. 2, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which provides that "Where the offence . . . . is begun within the jurisdiction of one Court and completed within the jurisdiction of another Court of summary jurisdiction, such offence may be tried by any one of such Courts," it is unnecessary to decide. It is enough to say that the offence was triable before the justices who heard the case.

The appellants' second contention raises a somewhat difficult point, but on the whole I do not think that the omission to serve a copy of the analyst's certificate with the summons was a matter which went to the justices' jurisdiction. It was in my opinion an informality in the procedure only which the party charged might waive either by express words or by conduct. Here I think it is plain that the appellants by allowing the case to proceed and asking for an adjournment waived the objection which they might have taken.

ROWLATT J. The first question is at what point of time is the offence of giving a false warranty in writing complete. The section in question makes the giving of such a warranty a criminal offence for the purpose of protecting a purchaser who

finds himself in possession of goods with a false warranty which misled him as to their nature or quality. The offence is giving the false warranty to the purchaser. When is it so given to him? I think not until he receives it. If the goods are despatched by the vendor with a warranty, but the warranty is withdrawn before they reach the purchaser, it cannot be said to be given to him. If it does in fact reach him I do not say that the prosecution might not be brought in both places, that is to say, where the warranty was written and sent off, and where it was received. But in any view it was given to him in the latter place. With regard to the appellants' second objection I think it is not well founded. Here the summons was perfectly good, but the prosecutor neglected to comply with the provision of s. 19, sub-s. 2, requiring that service of it shall be accompanied by service of a copy of the analyst's certificate. That is an omission which, if the party summoned takes the objection as soon as the case is called on, cannot be got over by adjournment. Still the fact remains that it is nothing more than a neglect to observe a formality accompanying service, and if the party charged likes to appear and say that he does not care about service of the copy of the certificate, or if by his conduct he waives such service, the jurisdiction of the justices is not affected by the omission. Then did the appellants waive the objection here? They appeared, not for the purpose of taking the objection, but for that of trying to break down the prosecution by cross-examination, and when they had failed in that and were called on for their answer they for the first time took the objection. It was then too late to do so. It was no doubt pointed out in *Batt* v. *Mattinson* (1) that the provision as to service of the certificate is imperative, meaning thereby that the omission is one which could not be put right if the objection is taken at the proper time. But there the objection was taken at once as soon as the case was called on. The Court did not decide that it could not be waived.

ATKIN J. I agree on both points. I think that the warranty was given to the purchaser within the meaning of s. 20, sub-s. 6, when he received it. I also think that the neglect to serve the

(1) 64 J. P. 615.

1913

GRIMBLE & Co. v. PRESTON.

Atkin J.

copy of the analyst's certificate with the summons did not deprive the justices of jurisdiction. It was an informality in the procedure which no doubt could not have been cured, and would have entitled the appellants to have the case dismissed if the objection had been taken at once, but it was one which was capable of being waived; and I think that a person who, knowing of the informality, waits until after cross-examination before taking it waives it. Mr. Macmorran goes the length of saying that if the appellants had allowed the case to be heard out without complaint they could still take the objection even after conviction. With that I do not agree.

Appeal dismissed.

Solicitors for appellants: *Neve, Beck & Kirby.*

Solicitors for respondent: *Judge & Priestley, for Philip Baker & Co., Birmingham.*

J. F. C.

1913

Dec. 19.

GEORGE *v.* JAMES.

Shop Assistant — Weekly Half-holiday — Employment in Afternoon about Business of Shop—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *s.* 1.

By s. 1, sub-s. 1, of the Shops Act, 1912, "On at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

The appellant was the manager of a shop at B. belonging to a company which owned many similar shops in different parts of the country. The appellant employed his shop assistants, in consideration of extra remuneration, to distribute certain handbills in the neighbourhood during their spare time. The handbills consisted of an advertisement of the company's margarine, but contained no mention of their particular shop at B. The assistants distributed the handbills to passers-by in the streets and at houses in the neighbourhood on the afternoon of the day of the week fixed under the Shops Act, 1912, for the weekly half-holiday for that shop:—

Held, (1.) that to constitute a breach of the above section it was not necessary that the handbills should specially refer to the shop at B., and that the assistants in distributing them were not the less employed about the business of that shop because they were thereby also advertising the business of the company's other shops; and (2.) that an

1913

GEORGE v. JAMES.

employment of the assistants to do the work in their spare time generally included an employment to do it on the half-holiday afternoon which was their principal spare time.

CASE stated by justices for the county of Glamorgan.

The appellant was summoned upon three informations under the Shops Act, 1912 (1), charging that on Thursday, June 5, 1913, three shop assistants were employed about the business of a shop at Bargoed in the said county, of which the appellant was manager, after 1.30 P.M., Thursday being the day of the week fixed by him as that on which the assistants would not be employed after 1.30.

At the hearing of the informations the following facts were proved or admitted.

The appellant was the manager of a shop at 31, South Street, Bargoed, of which shop Lipton, Limited, were the tenants and proprietors of the business carried on therein. The shop assistants to whom the proceedings referred were persons named respectively Jones, Moss, and Davies, who were assistants employed by Lipton, Limited, in their said shop. Thursday was the day of the week fixed by the appellant for the weekly half-holiday pursuant to the Shops Act, 1912. On Thursday, June 5, 1913, at 2.30 P.M., an inspector appointed by the local authority for the purpose of administering the said Act saw Jones and Moss in Henry Street, Bargoed, distributing handbills to passers-by and delivering such handbills to each house in the street. On the same day at 3 P.M. the inspector saw the other assistant, Davies, at Gilfach (which is about a mile from Bargoed) distributing similar handbills to houses and passers-by. The handbills consisted of an advertisement of margarine as sold by Lipton, Limited, the name "Lipton" appearing on the face of the bill, but it contained no reference to their particular shop at Bargoed. For the work of distributing the handbills the said

(1) By s. 1, sub-s. 1, of the Shops Act, 1912, "On at least one week-day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

By sub-s. 2, "The occupier of a shop shall fix . . . . the day of the week on which his shop assistants are not employed after half-past one o'clock."

By sub-s. 4 a penalty is imposed for a failure to comply with the provisions of the section.

1913

GEORGE v. JAMES.

assistants were paid by the appellant, but not as part of their ordinary work of serving customers in the shop. Lipton, Limited, had previously employed an advertising agent to distribute the handbills, but the assistants asked to be allowed to do this work in their spare time, and they were paid an extra sum for such distribution. It was no part of the conditions of their engagement that they would do this additional work, but they were in fact paid for it at the same time as they were paid their ordinary wages. The arrangement for and the payment for such extra work were with the knowledge and approval of Lipton, Limited.

On behalf of the appellant it was contended, inter alia, that the assistants in so distributing the handbills were not employed "about the business of the shop" at Bargoed within the meaning of s. 1, sub-s. 1, of the said Act.

The justices overruled the contention and convicted the appellant.

Elliott, K.C., and *Russell Davies*, for the appellant. Employment "about the business of the shop" means employment *in* the shop; it must be employment as a shop assistant, and by s. 19 the expression "shop assistant" is defined to mean "any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods." The object of the Act was to ensure in the interests of the assistants' health that they should have the opportunity of getting fresh air and exercise on one afternoon in the week, and if an assistant chooses to distribute handbills for his employer during his afternoon walk that does not contravene the Act. But assuming that the work complained of need not be done inside the shop, it is not enough that it should be about the business of the employer; it must be about the business of the shop, that is to say, the particular shop where the assistant is employed. Although not stated in terms in the case, it is matter of common knowledge that Lipton, Limited, have numerous similar shops in different parts of the country, and there was nothing to shew that the handbills were advertising the business of the shop at Bargoed as distinguished from the

business at the other shops. If the name of the appellant's shop had been on the bills that would have been another matter.

[CHANNELL J. Is it not a better point that these assistants were not employed to do this work on the half-holiday afternoon, inasmuch as they might have done it in their spare time on any other day?]

Vaughan Williams, K.C., was only called upon with reference to the latter point suggested by Channell J. The assistants were employed to do the work during their spare time, and the half-holiday afternoon was practically their only spare time, as the appellant well knew. It is a question of fact which was decided against the appellant.

CHANNELL J. Upon the question whether the appellant's assistants were employed about the business of the shop at Bargoed I think it is clear that the words "a shop assistant shall not be employed about the business of a shop" mean "about the business of the particular shop in which he is an assistant." If a shop assistant likes to accept employment during his half-holiday in another shop in the neighbourhood owned by another proprietor but where a similar business is carried on there is nothing in the Act of Parliament to prevent his doing so, and the manager of that shop in so employing him will commit no offence. But here the hand-bills which the assistants were engaged in distributing related to the business of Lipton, Limited, who were the proprietors of the shop in which they were engaged. It is true that the bills related to that business generally and it would have been equally satisfactory to the proprietors if the distribution of the bills had resulted in the purchase by the public of their margarine at any of their other shops. But the fact that it assisted the business of those other shops did not cause it any the less to assist the business of this particular shop. The only difficulty that I felt in the case was upon the question whether the assistants were employed to do what they did on the half-holiday afternoon. The finding was that they were employed to do it during their spare time. No doubt that did not necessarily

1913

GEORGE v. JAMES.

Channell J.

involve the conclusion that they were employed to do it on the half-holiday. But if we were to hold that an employment to do particular work during the assistants' spare time was not an employment to do it during what was their principal spare time I think we should be opening a wide door to evasion of the Act. The appeal must be dismissed.

AVORY J. I am of the same opinion. The only point which counsel thought proper to argue was whether the assistants could be said to have been employed on the occasion in question about the business of Lipton, Limited's shop at Bargoed, when all that they were employed to do was to distribute bills relating to Lipton, Limited's business generally and not containing any special reference to the business at that particular shop. As soon as it was admitted, as it was, that an assistant who goes round in a cart and solicits orders for his master's shop is employed about the business of that shop it followed that the point must be decided against the appellant. No distinction can be drawn between soliciting orders for the employer's shop and advertising the business carried on there, and if so an assistant who by distributing handbills advertises the business carried on at all of the employer's shops does not the less advertise the business of the shop at which he is engaged because he by the same act also advertises the business carried on at the other shops.

ATKIN J. I agree.

Appeal dismissed.

Solicitors for appellant: *Neve, Beck & Kirby.*
Solicitors for respondent: *Wrentmore & Son.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1913
Nov. 11.

LORD TREDEGAR *v.* ROBERTS AND ANOTHER.

[1913 T. 112.]

Practice—Joinder of Causes of Action—Claim by Executor—Personal Claim—Rules of the Supreme Court, 1883, *Order* XVIII., *rr.* 1, 5, 7.

By Order XVIII., r. 5, "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

A tenant for life of a house granted a lease of it at a rent of 9*l.* a year, and the lease became vested in the defendant. A year's rent became due during the lifetime of the tenant for life. The tenant for life died, and the plaintiff, who was his sole executor, became entitled to the reversion expectant on the determination of the lease. Subsequently a half-year's rent became due. The plaintiff brought an action to recover possession of the house, and as executor and also in his personal capacity to recover 13*l.* 10*s.*, being the amount of the year's rent which accrued due in the lifetime of the tenant for life and the half-year's rent which accrued due subsequently:—

Held, that, as the claims by the plaintiff personally did not arise with reference to the estate of which he was executor, they could not be joined in the same action, and the order would be that the plaintiff should elect which claim he would proceed with, and failing such election that the proceedings in the action should be stayed.

APPEAL from an order of Astbury J., sitting as vacation judge in chambers.

The writ of summons was indorsed as follows: "The plaintiff's claim is as against both the defendants to recover possession of a messuage or dwelling-house" at Newport, in the county of Monmouth, "now in the occupation of" the second defendant "as sub-tenant of the defendant" Roberts.

"And as executor of Godfrey Charles Viscount Tredegar and also in his personal capacity as against" the defendant Roberts "for 13*l.* 10*s.* arrears of rent.

"And for mesne profits."

The defendant Roberts was the assignee of a lease of the house in question granted by the late Lord Tredegar, who was tenant for life of the property, at a ground rent of 9*l.* a year.

C. A. 1913

TREDEGAR (LORD) v. ROBERTS.

On September 29, 1912, a year's rent, 9*l.*, accrued due. On March 11, 1913, the late Lord Tredegar died. The plaintiff was his sole executor and also became entitled to the reversion expectant upon the determination of the lease of the house. On March 25, 1913, a further half-year's rent, 4*l.* 10*s.*, became due. These two sums of 9*l.* and 4*l.* 10*s.* made up the 13*l.* 10*s.* sued for in the action. The writ was issued on July 10, 1913. There was a forfeiture clause in the lease for non-payment of rent.

The defendant Roberts applied at chambers for an order to strike out the writ of summons or to stay proceedings in the action on the ground that the plaintiff had joined a claim by him as executor with a claim by him personally, such last-mentioned claim not being alleged to arise with reference to the estate of the testator in respect of which he sued as executor. The district registrar refused the application and Astbury J. affirmed his decision. The defendant appealed.

J. B. Matthews, K.C., for the defendant. Before the Judicature Acts such a joinder of claims as is now authorized by Order XVIII., r. 5, would not have been allowed. That rule provides that "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." That rule, however, is confined to a case where the "personal" claim is in respect of the assets of the testator: *Johnson* v. *Burges*. (1) As Hall V.-C. pointed out in *Padwick* v. *Scott* (2), the rule was intended to remedy the difficulty in cases "where the executor or administrator has been dealing with the assets, or making contracts in the course of the administration, properly and fairly in his character of executor or administrator," and then it became a question whether, as the contracts had been entered into by him personally, he should be sued in his character of legal personal representative or in his personal character. In the present case the plaintiff is joining a claim as executor to recover a sum of money due to the testator's

(1) (1878) 47 L. J. (Ch.) 552. (2) (1876) 2 Ch. D. 736, at p. 743.

estate with personal claims which have no connection with the testator's estate. This is not authorized by r. 5. There has been a misjoinder of causes of action, and the Court will order one or other of the claims to be struck out: *Whitworth* v. *Darbishire*. (1) The proper order, therefore, is that the plaintiff shall elect with which he will proceed, and that the writ shall be amended by striking out the cause of action which the plaintiff has abandoned, and that, if the plaintiff do not so elect, the action shall be dismissed or stayed. [*Wilmott* v. *Freehold House Property Co.* (2) was also referred to.]

J. Leslie, for the plaintiff. Rule 5 of Order XVIII. is by r. 7 subject to r. 1, which is very wide in its language, and allows a plaintiff to unite in the same action several causes of action, subject to the power of the Court, either under that rule or under r. 8, to order separate trials of any such causes of action if it appears to the Court that they cannot be conveniently disposed of together. Rule 1 is the main rule. There is no suggestion in this case that the causes of action cannot be conveniently disposed of in the action. It is most convenient to have these causes of action disposed of together. Expense will thereby be saved. The Court at the present day endeavours to give a construction to the rules which will allow all causes of action, which can be conveniently disposed of together, to be so disposed of. There are in substance in this case two plaintiffs and two causes of action, and Order XVI., r. 1, and Order XVIII., r. 1, allow them to be joined in one action. [*Bullock* v. *London General Omnibus Co.* (3) was referred to.]

Further, the application is wrong in form. The defendant has no right to have the writ struck out or the proceedings stayed; he ought to have applied under Order XVIII., r. 8, to stay one or other cause of action, not both.

J. B. Matthews, K.C., was not called upon to reply.

BUCKLEY L.J. Joinder of causes of action is governed by Order XVIII. of the Rules of the Supreme Court, 1883, of which rr. 1, 5, and 7 are the material rules in this case. Rule 1 is

(1) (1893) 68 L. T. 216. (2) (1884) 51 L. T. 552.
(3) [1907] 1 K. B. 264.

C. A. 1913

TREDEGAR (LORD) v. ROBERTS.

Buckley L.J.

expressed to be subject to r. 5, and by r. 7 r. 5 is made subject to r. 1. Each of the two rules 1 and 5 is therefore made subject to the other. That is not very artistic drafting. The result, however, appears to be that, the particular case to which r. 5 applies being dealt with specially by that rule, the Court has to apply r. 5 as being for this purpose independent of r. 1. Rule 1, which is the general rule, provides that "subject to the following rules of this Order, the plaintiff may unite in the same action several causes of action." That general rule is, as I have said, subject to r. 5, which deals specifically with a particular case, and in such a case r. 5 seems to me to be the dominant rule to which I must have regard. Further, however, r. 5 is by r. 7 made subject to r. 8. This last mentioned rule deals with a case where the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, a matter which has been already dealt with generally in r. 1. If I am right in thinking that in the particular case dealt with by r. 5 that rule is to prevail over r. 1 if and so far as they conflict, the introduction of r. 8 into r. 5 creates or gives no necessity or room for the application of any of the provisions of r. 1 in the particular case. Rule 5 therefore is the rule dealing with the joinder of causes of action in this case, and the Court must apply that rule.

The late Lord Tredegar, of whose estate the plaintiff is executor, was entitled to be paid by the defendant Roberts, his tenant, 9*l.* for the rent of a house due at Michaelmas, 1912. He died on March 11, 1913. The plaintiff as the late Lord Tredegar's executor is entitled to sue for that sum. The late Lord Tredegar was tenant for life of certain property which included the house in question, and the plaintiff succeeded to that property. A further half-year's rent to the amount of 4*l.* 10*s.* became due at Lady Day, 1913, and the plaintiff is personally, and not in his character of executor, entitled to sue for that sum and to forfeit the lease if that sum remains unpaid. These several causes of action have been joined in this action. The plaintiff therefore is suing in this action as executor to recover 9*l.* due to the late Lord Tredegar's estate, and in his own right to recover 4*l.* 10*s.* and possession of the house.

I have to apply r. 5 of Order xviii. to that state of circumstances. That rule, reading only the relevant words, provides that claims by an executor as such may be joined with claims by him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff sues as executor. It is obvious that the claims in the present case by the plaintiff personally do not arise with reference to the estate of the late Lord Tredegar of which the plaintiff is the executor. The action therefore is not justified by r. 5. The object of that rule, I conceive, is to prevent an executor or administrator from intermingling the assets of his testator with his own moneys. It is not desirable that claims to recover money personally and not as executor should be joined with claims to recover money as executor, for if they were allowed to be joined, a possibility of confusion of assets might result. This action is therefore brought in a form not sanctioned by r. 5. It is said that the defendant's remedy is to apply under r. 8, which provides for the case of joinder of causes of action "which cannot be conveniently disposed of together." In my opinion that is not so. It is not a question of convenience. The objection is that the causes of action cannot consistently with the rules be joined in one action, and that objection must prevail. The order will be in the form suggested by Mr. Matthews, that the plaintiff shall have fourteen days to elect with which cause of action he will proceed, and upon his election the trial will be confined to that cause of action; and that, if he does not elect, the proceedings in the action be stayed. The appeal must be allowed.

KENNEDY L.J. I agree for the reasons given by my Lord.

Appeal allowed.

Solicitors for plaintiff: *Rider, Heaton & Co., for Davis, Lloyds & Wilson, Newport (Mon.).*

Solicitors for defendant: *Indermaur & Brown, for W. R. Russill, Newport (Mon.).*

W. F. B.

1913
Nov. 24.

MACGREGOR *v.* CLAMP & SON.

Distress—Distress for Tax—Tax charged upon Premises—Income Tax under Sched. A—Inhabited House Duty—Goods of Third Person on the Premises—Implement of Trade—Taxes Management Act, 1880 (43 & 44 *Vict. c.* 19), *s.* 86.

Under s. 86 of the Taxes Management Act, 1880, a collector of taxes may distrain for arrears of income tax under Sched. A of the Income Tax Act, 1842, and for inhabited house duty, which are taxes charged on the land, the goods of a third person on the premises charged; and an implement of trade is not exempt from a distress for taxes.

Juson v. *Dixon* (1813) 1 M. & S. 601, and *Hutchins* v. *Chambers* (1758) 1 Burr. 579, followed.

APPEAL from the Greenwich County Court.

The plaintiff claimed damages in this action for the wrongful distress of her piano. The sum of 1*l.* 11*s.* was due and in arrear for income tax under Sched. A of the Income Tax Act, 1842, and for inhabited house duty, in respect of the house occupied by the husband of the plaintiff. He refused to pay those taxes upon demand by the collector of taxes, and the defendants, as agents for the collector, distrained upon the house, under s. 86 of the Taxes Management Act, 1880 (1), and seized and sold a piano which was the property of the plaintiff. The piano was used by the plaintiff for giving music lessons.

The county court judge held that the Law of Distress Amendment Act, 1888, did not apply to a distress for taxes and that the piano was not exempt from such distress as an implement of trade; and, upon the authority of *Juson* v. *Dixon* (2), that a

(1) 43 & 44 Vict. c. 19, s. 86, sub-s. 1: "If a person refuses to pay the sum charged upon him by virtue of the Land Tax Acts, the Tax Acts, or this Act, on demand made by the collector, according to the assessments and warrants to him delivered by the Land Tax and General Commissioners, such collector may, and he is thereunto authorized and required, for non-payment thereof, to distrain upon the messuages, lands, tenements, and premises charged with such sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as the collector is hereby authorized to distrain, without any further authority from the said respective Commissioners for that purpose than the warrant to such collector delivered on his appointment."

(2) 1 M. & S. 601.

1913

MACGREGOR v. CLAMP & SON.

distress for these taxes could be levied upon the goods of a third person upon the premises. Judgment was accordingly given for the defendants. The plaintiff appealed, with leave.

Russell Davies, for the appellant. First, the piano was exempt from distress as an implement of trade. The Law of Distress Amendment Act, 1888 (1), by s. 4, exempts from distress any goods which are protected from seizure in execution by s. 147 of the County Courts Act, 1888 (2), and that section so protects implements of trade to the value of 5*l.*; and that exemption applies even if the only implement of trade is worth more than 5*l.*: *Lavell* v. *Ritchings*. (3) The Law of Distress Amendment Act, 1888, in terms applies only to distress for rent; but even if it must be limited to distress for rent, a distress for income tax under Sched. A of the Income Tax Act, 1842, is really a distress for rent, because the occupier who has to pay the tax is empowered to deduct from his next payment of rent the sum which he has paid in respect of the tax, and such payment is pro tanto a payment of rent: *In re Sturmey Motors, Ld.* (4)

Secondly, s. 86 of the Taxes Management Act, 1880, does not give power to distrain upon the goods of a third person. The case of *Juson* v. *Dixon* (5) is distinguishable from the present case. There the tax in question was charged upon the premises, but income tax under Sched. A is not a tax charged upon the premises in the same sense as the tax in *Juson* v. *Dixon* (5); and the case of *Shaftesbury* v. *Russell* (6) shews that where a tax is not charged upon the premises the goods of a third person cannot be distrained, but only the goods of the person charged. It must be admitted that inhabited house duty cannot be distinguished from the tax in question in *Juson* v. *Dixon*. (5)

S. P. J. Merlin, for the respondents. Both these taxes are taxes charged upon the premises, and therefore *Juson* v. *Dixon* (5) is a direct authority that the goods of a third person upon the premises can be distrained. The provisions of s. 70 (7) of the

(1) 51 & 52 Vict. c. 21.
(2) 51 & 52 Vict. c. 43.
(3) [1906] 1 K. B. 480.
(4) [1913] 1 Ch. 16.
(5) 1 M. & S. 601.
(6) (1823) 1 B. & C. 666.
(7) 5 & 6 Vict. c. 35, s. 70: "The said several duties shall be assessed on all lands, tenements, and hereditaments, whether occupied

1913

MACGREGOR v. CLAMP & SON.

Income Tax Act, 1842, shew clearly that the tax under Sched. A is charged upon the premises and is not a merely personal tax.

The Law of Distress Amendment Act, 1888, clearly does not apply: in terms it applies only to distress for rent, and, further, the Crown is not expressly named in it. The common law exemption in respect of an implement of trade does not apply to the Crown's right of distress for taxes: *Hutchins* v. *Chambers*. (1)

BRAY J. In this case an action was brought by the owner of a piano to recover damages for its removal and sale. The defence was that the defendants were executing a distress under the warrant of a collector of taxes, and the county court judge decided in favour of the defendants. Several points were made on behalf of the plaintiff—that the piano was an implement of trade and was therefore not distrainable, and that the piano did not belong to the occupier of the premises and therefore was not liable to distress.

It was contended that this was really a distress in the nature of a distress for rent, and consequently came within the Law of Distress Amendment Act, 1888. The answer to that is that the Act applies only to a distress for rent and this was a distress for taxes; and there is a further answer, that the Act does not limit the rights of the Crown at all, and that the rights of the Crown are not affected by any statute unless expressly dealt with. It was further said that this piano being an implement of trade could not at common law be seized under a distress; but the authority which has been cited, *Hutchins* v. *Chambers* (1), is an

---

at the time of the assessment or not; and so far as respects the duties chargeable under Schedule (A.), in case any lands charged to the said duties shall be unoccupied, and no distress can be found on the same at the time such duties shall be payable, it shall be lawful for the collector of the parish or place where the said lands are situate for the time being, at any time after, to enter upon the said lands when there shall be any distress thereupon to be found, and the distress to seize and sell, under the like powers as he might have distrained on the same lands if in the occupation of such person at the time the duties became due; . . . ."

(1) 1 Burr. 579.

answer to that contention. In that case Lord Mansfield C.J. held that where a distress was really in the nature of execution that exemption did not apply and the right to distrain was not so limited, and that the right of distress by the Crown for taxes was really by way of execution. That disposes of the point that the piano was an implement of trade.

The next point, which was principally argued before us, was that there was no right to distrain upon the goods of a person from whom the tax was not due. That point, in respect of the window tax, was expressly decided in *Juson* v. *Dixon*. (1) There the same point was expressly made and the judges had to construe a statute similar in all respects to s. 86 of the Taxes Management Act, 1880, which is word for word the same as s. 33 of 43 Geo. 3, c. 99, which was construed in *Juson* v. *Dixon*. (1) Therefore it seems to me that that case is an authority upon the construction of s. 86 of the Act of 1880. The marginal note to the report of that case is as follows: "The collector of the house and window tax under 43 Geo. 3, c. 161, may distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears." That note is a correct summary of the decision, and the case decides the very point now before us, though with regard to the house and window tax.

In the present case the taxes are income tax under Sched. A and inhabited house duty. The appellant admits that the case of inhabited house duty cannot be distinguished; but it is contended that income tax under Sched. A, though levied upon the occupier, is not really a tax upon the occupier or charged upon the premises. I think that contention is answered by referring to s. 70 of the Income Tax Act, 1842, under which this tax is imposed. That section provides [his Lordship read the section]. This tax is, therefore, a distinct charge upon the lands and premises. In my opinion, therefore, it is impossible to distinguish this case from *Juson* v. *Dixon*. (1) Another case was cited, *Shaftesbury* v. *Russell* (2), where the question was not as to a tax charged on land, but as to a tax upon carriages, &c., and it was

(1) 1 M. & S. 601.

(2) 1 B. & C. 666.

1913

MACGREGOR v. CLAMP & SON.

held that there was no power to distrain upon the goods of a third person because the tax was not charged upon land but upon the taxpayer.

I am therefore of opinion that the decision of the county court judge was right upon all points, and that this appeal fails.

Bray J.

LUSH J. I agree. The common law was always more indulgent to a tenant, as between him and his landlord, than to a taxpayer, as between him and the Crown. They both had power to distrain, but this limit was put on the power of the landlord, that the tenant's implements of trade were exempt from distress. There was no such limit in the case of a distress by the Crown for taxes. Although the mode of recovering is by distress, yet the process is really analogous to execution on a judgment, and there never was, at common law, any such exemption in the case of distress for taxes.

It is impossible to look at the Law of Distress Amendment Act, 1888, without seeing that it imposes no limit on the right of the Crown to distrain. The language of the Act shews that it was passed for the further relief of tenants and that it does not affect distress for taxes; and, further, the Crown is not named in it and is therefore not bound by its provisions.

With regard to the second point, it seems to me to be clear on looking at the language of s. 86 of the Taxes Management Act, 1880, and considering what was the law before that Act, that that section does give the right to the Crown, both in the case of inhabited house duty and of the duties under Sched. A of the Income Tax Act, 1842, to distrain not only on the goods and chattels of the taxpayer, but also upon any goods upon the premises charged. The language of the section is clearly wide enough to cover such goods and is identical with that of s. 33 of 43 Geo. 3, c. 99. Now, there is this limit, according to the decision in *Shaftesbury* v. *Russell* (1), to be placed upon the provisions of s. 86 of the Act of 1880, that if the particular tax is one which is solely and strictly charged upon the person who has to pay it, then, notwithstanding the language of the statute, the tax being a purely personal one, it can only be recovered by

(1) 1 B. & C. 666.

distress upon the goods of the person chargeable with the tax. If, however, the tax is not purely personal but is charged upon the premises, then it matters not that the goods seized belong to a third person. The decision in *Juson* v. *Dixon* (1) is a clear authority to that effect.

Now, in this case the appellant did not contend that inhabited house duty was not charged upon the premises; but he contended that income tax under Sched. A was not so charged. In my opinion s. 70 of the Income Tax Act, 1842, shews conclusively that this tax is really charged upon the premises. Therefore this case falls within the decision in *Juson* v. *Dixon* (1), and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Good, Good & Co.*
Solicitors for respondents: *Hawks, Stokes & Co.*

J. H. W.

BURRELL & SONS *v.* F. GREEN & CO.

1913
Nov. 11.

Shipping—Charterparty—Loss of Time—Cesser of Hire—"Damage preventing working of vessel"—"Accident to cargo"—Vessel driven into Port—"Such detention or loss of time"—Damage to Vessel by shifting of Deck Cargo.

A ship was chartered for a voyage at a certain sum per calendar month. The charterparty contained the following clause:—"In the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours . . . . ; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The ship was loaded by the charterers with a cargo of lumber including a deck cargo. Soon after starting she encountered heavy weather; the deck cargo shifted and damaged the ship. She was taken into port; the cargo was discharged, and repairs were done to the ship. These repairs occupied nine days and twelve hours and were rendered

(1) 1 M. & S. 601.

1913

BURRELL & SONS v. F. GREEN & CO.

necessary by the combined effect of stress of weather and the shifting of the deck cargo:—

Held, that the nine days and twelve hours were time lost from "damage preventing the working of the vessel" and were not "detention or loss of time" from the ship being "driven into port by stress of weather, or from accident to the cargo," within the meaning of the above clause, and that the ship was off hire for that period.

AWARD in the form of a special case stated by an umpire.

By a charterparty dated July 4, 1912, and made between Messrs. Burrell & Sons, the owners, and Messrs. F. Green & Co. as agents for Messrs. Hind, Rolph & Co., of San Francisco, the charterers, it was agreed that a "Strath" steamship thereafter to be named was chartered by the owners to the charterers for one trip to Australia upon the terms and conditions therein set out. The charterparty contained an arbitration clause. The steamship *Strathdene* was named and provided to fulfil the charterparty. Disputes arose between the owners and charterers as to a deduction made by the charterers from the hire claimed by the owners:

(1.) In respect of time lost at Portland;

(2.) In respect of time lost by putting into Victoria.

Arbitrators were appointed and failed to agree and an umpire was appointed. Upon the hearing of the reference the charterers required a case to be stated upon certain points of law with regard to the dispute numbered 2 above.

The umpire found and awarded that apart from the questions arising upon dispute No. 2 there was due from the charterers to the owners a balance of 257*l.* 16*s.* 11*d.* After recitals and an award to the above effect the umpire proceeded thus to state the

"Special Case.

"2. With regard to the dispute No. 2 above, I find that the facts are as follows:—

"3. It was provided by the said charterparty that the vessel was to be placed at the charterers' disposal with clear holds, tight, staunch, and strong, and in every way fitted for the service, and to be employed in such lawful trades as charterers or their agents should direct. The charterparty further provided as follows: That the owners should maintain the vessel in a thoroughly

efficient state in hull and machinery for the service. That the charterers were to provide and pay for all winchmen and lashings . . . . also all charges appertaining to the cargoes that they might put on board. That the charterers were to pay hire at the rate mentioned in the charterparty which hire was to continue from the date of her delivery to the charterers until her redelivery to the owners as therein mentioned. That the charterers had the privilege of loading any usual lawful deck cargo to be carried at charterers' and/or shippers' risk. That the captain should prosecute his voyages with the utmost despatch, and lend all customary assistance with any cranes and/or winches the steamer had. That the captain should be under the orders and directions of the charterers as regards employment, agency, or other arrangements. That the owners should not be responsible for damage to, or claims on, cargo caused by bad stowage, the stevedores being employed by the charterers. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost should be allowed to the charterers, including first twenty-fours, and if such detention should exceed thirty days the charterers were to have the option of cancelling the charter; but that should the vessel be driven into port or anchorage by stress of weather, or from accident to the cargo, such detention or loss of time should be at the charterers' expense. A true copy of the said charterparty is annexed hereto and may be referred to as part of this case.

"4. The said vessel was loaded by the charterers with a cargo of lumber including a deck cargo to a height of 15 feet 3 inches on the forward deck and 13 feet 4 inches on the after deck, and she sailed from Portland with the said cargo for Japan at 3 P.M. on November 9, 1912. The vessel called at Tacoma for coals and left that port on November 11.

"5. On November 13, 14, 15, and 16 the vessel encountered very bad weather and in consequence thereof the stowage of the deck cargo shifted, it became insecure, the forward deck cargo was swaying to and fro dangerously, and a quantity of the forward deck cargo was washed overboard. The movement of

1913

BURRELL & SONS v. F. GREEN & CO.

the deck cargo caused a dangerous list and some damage to the vessel; the wind and sea were falling and a portion of the deck cargo was jettisoned, but it was impossible adequately to secure the deck cargo. By reason of the shifting of the cargo the ship and the lives of those on board her were seriously imperilled, and it was decided (according to the record in the log book) to return to port to restow it and repair the damage done to the vessel in consequence of the cargo shifting.

"6. A complete examination could not then be made because of the deck cargo, but it was ascertained that the foremast and port bulwarks were seriously damaged and that the rigging and stays forward and aft were damaged, strained, and broken; the starboard lifeboat was smashed and the engine room casing buckled. There was some slight injury to the boat deck planks and the ventilators were smashed, but the vessel made no water.

"7. At 3 P.M. on November 16 the course of the vessel was altered to bear up for Victoria, British Columbia, and at 6.38 P.M. on November 19 the vessel arrived at Victoria.

"8. On the following morning, the 20th, surveys were held; it was found that a portion of the forward deck load was missing and the remainder of the forward deck load was more or less started and the upper tiers of the deck load aft shewed signs of having worked.

"9. The surveyors recommended that sufficient lumber should be discharged from the forward deck to allow of an examination of the forward decks and for the purposes of properly restowing the cargo and also that a sufficient quantity of lumber be discharged from the after deck to admit of an examination of the steering gear leads and pins and blocking in the way of the steering rods. The surveyors also recommended certain repairs to be carried out to the vessel.

"10. The master immediately on arrival at Victoria applied to the charterers for advice and instructions with regard to the restowage of the deck cargo. I find as a fact that the charterers ought in the ordinary course of business to have given the master instructions with regard to the deck cargo, but they failed to do so for a considerable time, and in consequence of this failure the discharging of the deck cargo, which was recommended

1913

BURRELL & SONS v. F. GREEN & CO.

by the surveyors, was not commenced until 6 A.M. on Monday, November 25, and time was lost thereby. The discharging of the after deck cargo continued until noon of Tuesday, the 26th, when the surveyors considered that sufficient of the after deck cargo had been removed, but the discharging of the forward deck cargo occupied until 2 P.M. on December 1, when the whole of the fore deck cargo was discharged.

"11. When the cargo was discharged the extent of the damage to the foremast could be seen and a more thorough examination made of the damage to the vessel.

"12. Temporary repairs were carried out to the mast and permanent repairs to the bulwarks, rigging, and steering gear, and some other slight repairs.

"13. All these repairs with the exception of some repairs to the steering engine and caulking of the boat deck (neither of which interfered with the work of reloading) were completed by Wednesday, December 11, at 2 A.M., and at 7 A.M. on this day the reloading commenced and was continued without interruption, except for bunkering, until 1 P.M. on December 19, when the cargo was all on board, and the vessel sailed at 8 A.M. on December 20.

"14. It was originally contended by the charterers that the vessel was off hire from 3 P.M. on November 16, when she was put back, until December 24, when it was estimated that she would again have been in the neighbourhood of the spot where she first put about for Victoria; but during the hearing before me it was conceded by the charterers' counsel that the charterers could not claim to deduct hire beyond 8 A.M. on December 20 making 33 days 17 hours in all.

"15. The owners on the other hand contended that, by reason of the circumstances under which the vessel had to put back, they were entitled to hire for the whole period without any deduction; or alternatively the only deduction that could be made was in respect of the time that the vessel was actually undergoing repairs and without any cargo work being carried out; and, in the further alternative, that the time which was lost between the vessel's arrival at Victoria at 6.38 P.M. on November 19 and the commencement of the discharge on

1913

BURRELL & SONS v. F. GREEN & CO.

Monday, November 25, was due to the charterers' default in refusing or failing to give instructions with regard to the discharge of the deck cargo, and that in these circumstances the charterers were not entitled to claim a cesser of hire in respect of the time so lost.

"16. I find as a fact that the effective cause of the vessel putting back to Victoria was the shifting of the deck cargo, which was in peril of being wholly lost, [and] which in its insecure condition was a serious danger to the vessel and the lives of those on board her; and that but for the necessity of restowing and securing the deck cargo the vessel could and would (notwithstanding the damage caused to the vessel by the shifting of the cargo) have proceeded to her destination.

"17. I further find that, the vessel being in port at Victoria, it was necessary to repair her before she reloaded her deck load and proceeded on her voyage. The repairs could not have been effected without discharge of the deck cargo, but for its own safety, independently of that of the vessel and the under deck cargo, it was necessary to discharge and restow the deck cargo.

"18. I further find that on the vessel's arrival at Victoria there was in fact an unreasonable and improper refusal by the charterers to give instructions to the master whereby a period of 4 days 12 hours was lost.

"19. In case it may be necessary to apportion the time occupied by the different operations I divide the 33 days 17 hours approximately as follows:—

"Three days and four hours in actually steaming to Victoria;

"A reasonable time for surveys and for charterers giving instructions before discharge of deck cargo could begin say seventeen hours (up to noon December 20) [qu. November];

"Time lost through charterers' delay in giving instructions, 4 days 12 hours (up to midnight November 24);

"Time occupied in connection with discharge of deck cargo for purpose of restowing distinct from any work of discharging solely for the purpose of repairs, 6 days 14 hours (up to 2 P.M. December 1);

"Time occupied in repairing, 9 days 12 hours (up to 2 A.M. on December 11);

"Time occupied in reloading, 7 days 12 hours, and in bunkering and preparing for sea, 1 day 18 hours (sailed 8 A.M. December 20).

"20. If and so far as it may be a question of fact for me and subject to the opinion of the Court on any question of law arising, I find that there was no accident or damage which prevented the working of the vessel for more than twenty-four consecutive hours until the whole of the forward deck cargo was discharged on December 1. From that time the repair of the damage sustained as aforesaid prevented any work except repairing the damage until 2 A.M. on December 11.

"21. So far as it may be a question of fact for me, I find that consequent upon stress of weather the vessel was driven into port and was detained there until she sailed through an accident to the cargo, and, subject to the opinion of the Court upon any question of law arising, I find that the whole of the time lost in putting back to Victoria and whilst there was lost by reason of such accident to the cargo.

"22. I therefore find and award that there is due to the owners from the charterers in respect of dispute 2 the sum of two thousand six hundred and sixty-eight pounds nine shillings and nine pence (2668*l.* 9*s.* 9*d.*), representing 33 days 17 hours' hire at the net rate (after deducting six and a quarter per cent. commission as provided by the charterparty), and I direct that the charterers do pay that amount to the owners.

"23. If the Court, contrary to my award, should upon the above findings of fact hold that the vessel was off hire during the whole or any portion of the time occupied from the putting back on November 16 up to December 20, then I find and award that there shall be deducted from the amount above found due from the charterers to the owners under this head 78*l.* 15*s.* for each day and a proportionate rate for any part of a day for which it is held the vessel was off hire and in respect of which it is held that the owners are not entitled to recover from the charterers.

"24. I further award and direct that the fees and expenses of the arbitrators and of myself in connection with this reference amounting to 335*l.* 18*s.* and the taxed costs of the owners upon

1913

BURRELL & SONS v. F. GREEN & CO.

the reference shall be borne by the charterers and if the same or any part thereof shall be paid by the owners in the first instance they shall be entitled to recover the same from the charterers subject to this, that in the event of the Court holding that the owners are not entitled to recover the whole of the sum awarded to them under paragraph 22 hereof, the owners shall pay one ninth of the aforesaid fees and expenses and the balance of such fees and expenses and costs shall be borne by the charterers as aforesaid in addition to the owners' taxed costs of the reference.

"As witness" &c.

Maurice Hill, K.C., for the charterers. As to the nine days and twelve hours occupied in repairing the ship, this was time lost through shifting of deck cargo and stress of weather. The question is, was this time lost from "accident or damage preventing the working of the vessel," in which case the vessel is off hire for that period; or was it "detention or loss of time" consequent on the vessel being "driven into port or anchorage by stress of weather or from accident to cargo," in which case "such detention or loss of time shall be at the charterers' expense." Assuming that the ship was driven into port by stress of weather or from accident to cargo, time occupied in repairing the ship is not "such detention or loss of time." The detention or loss of time for which the charterers have to suffer is time lost in getting into and out of the port of refuge and time lost in repairing the results of accident to the cargo so far as they affect cargo, e.g., discharging and reloading. Damage to the ship falls under the earlier words "accident or damage preventing the working of the vessel." Those words are quite general and include damage to the ship however caused, provided it prevents the working of the vessel. Either it prevented the working of the vessel in this case or else the owners are liable for not prosecuting the voyage with due despatch.

As to the four days and twelve hours, the charterers are not to be charged with delay in giving instructions. They were at San Francisco; the ship was at Victoria. It was obviously

1913

BURRELL & SONS v. F. GREEN & CO.

necessary to discharge the cargo in order to see what damage was done to the ship, and as the owners were bound to prosecute the voyage with despatch, the master ought to have proceeded to discharge without awaiting instructions from the charterers.

Roche, K.C., and *A. Neilson*, for the owners. As to the four days and twelve hours, the findings of the umpire conclude this point in favour of the owners.

As to the nine days and twelve hours, the meaning of the charterparty is broadly that for the ship's default the ship is to pay; for example, for deficiency of men or stores, breakdown of machinery, or other serious accident of that nature; for these accidents the ship is off hire. But for accidents for which she is not to blame the charterers must pay. The ship takes the risk of ordinary navigation; but for extraordinary emergencies, such as stress of weather driving her into port, or accident to cargo, she is not responsible, and there is no cesser of hire for time lost through these contingencies. In such a case as this the causa causans and not merely the causa proxima is to be regarded: Carver on Carriage by Sea, ss. 88, 88a. The causa causans here was the accident to the deck cargo. This construction allows some force and effect to the latter part of the clause beginning at the words "but that should the vessel be driven into port." The charterers' construction makes that part redundant and unnecessary, as it merely imposes a liability already imposed by implication by the earlier part.

Maurice Hill, K.C., in reply. If it had been the intention of the parties that the charterers should be liable for damage to the ship through injury to cargo, it would have been easy to insert in the earlier part of the clause after the words "or other accident or damage" the words "unless caused by injury to cargo or stress of weather." This has not been done. The ship must carry the cargo with due despatch unless excused. It is for the owners to shew that they are excused. They have failed to do so in this case.

BAILHACHE J. The questions in this case arise upon the construction of a charterparty relating to the steamship *Strathdene*.

1913

BURRELL & SONS v. F. GREEN & CO.

Bailhache J.

The charterparty was dated July 4, 1912, and was a combination of a voyage and time charter. The *Strathdene* was on a voyage from Portland to Japan, carrying, amongst other things, a deck cargo. In the course of the voyage she encountered heavy weather; the deck cargo shifted, and it was found necessary for safety to put into Victoria, discharge the deck cargo, examine the ship, and do certain repairs, with the result that the ship was detained in Victoria for a period of thirty-three days and seventeen hours, including the time taken in putting back to Victoria.

The charterers claimed that during the whole of that period the vessel was off hire; the shipowners on the other hand claimed that during the whole period she was on hire. In the argument before me the charterers, in view of the findings in the special case, have abandoned their contention except as to four days and twelve hours, during which there was delay on the charterers' part in giving instructions as to what was to be done with this cargo, and nine days and twelve hours during which the ship was being repaired. I assume that the repairs done, occupying the nine days and twelve hours, were rendered necessary by the combined effect of stress of weather and shifting of the deck cargo.

This question turns on the construction of a clause in the charterparty which, omitting immaterial words, is as follows: "That in the event of loss of time from deficiency of men or stores, breakdown of machinery . . . . or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours . . . . but that should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The vessel was driven into port by stress of weather and from accident to the cargo, and the first question is whether the time occupied in repairing the damage to the ship herself is to be calculated as coming within the words "such detention" in the latter part of that clause, which says that "should the vessel be driven into port or to anchorage by stress of weather, or from accident to cargo, such detention or

loss of time shall be at the charterers' expense." Mr. Hill for the charterers contends that the words "such detention" mean only the actual loss of time that can be attributed to the ship being driven into port or to anchorage and to the delay actually occasioned by the accident to the cargo. He contends that in the case of injury to the ship itself the other part of the clause comes into operation, and that this is time lost from damage preventing the working of the vessel. He points out that if it were not so it would have been very easy for those who framed this charterparty to have inserted after the words "other accident or damage" the words "unless occasioned by accident to the cargo or stress of weather." Arguments to the effect that the parties to a charterparty might have expressed themselves more clearly are not, I fear, of much force.

Mr. Roche says that I ought to accept his interpretation of the clause because otherwise the words providing that the charterers shall bear the expense of loss of time through stress of weather or damage to cargo are redundant. Again, that argument does not impress me because charterparties often contain many redundant words. I must do my best with the words as I find them.

What have these parties bargained about? That question has to be determined by what they have in fact said. I have came to the conclusion that the contention of the charterers is right in this respect. I think the words "should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense" refer only to time actually lost by stress of weather or by accident to cargo, that is to say time lost in repairing the accident to cargo, for example in discharging and restowing the cargo, if that is necessary, but not time expended in repairing the ship itself. I do not think the words can properly include loss of time from damage to the ship caused by accident to the cargo or by stress of weather. When damage to the ship is caused by accident to the cargo or by stress of weather, the damage so caused comes, in my view, within the words "or other accident or damage preventing the working of the vessel" in the earlier part of the clause. There is no

1913

BURRELL & SONS v. F. GREEN & Co.

Bailhache J.

qualification of those words. For the purposes of this charterparty it matters not what is the cause of the damage to the ship. If she has been damaged from any cause and the damage requires to be repaired and delay is thereby occasioned exceeding twenty-four hours, the ship is off hire for that time.

[With regard to the period of four days and twelve hours, the learned judge held himself bound by the finding of the umpire and disallowed the claim of the charterers on that head. In the result it was held that the *Strathdene* was off hire for nine days and twelve hours.]

Award varied accordingly.

Solicitors for the charterers: *Parker, Garrett & Co.*
Solicitors for the owners; *Botterell & Roche.*

W. H. G.

1913

Nov. 11, 14.

MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER.

Shipping—Charterparty—Lay Days—Sundays excluded—Despatch Money—"All time saved in loading"—Sunday included in Despatch Days.

By the terms of a charterparty for a voyage the entire cargo, consisting of 5142 units, was to be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted). If the ship was longer detained demurrage was to be paid at a certain rate per running day. The charterparty contained this clause: "Owners agree to pay charterers 10*l.* (say ten pounds) per day for all time saved in loading":—

Held, that a Sunday was to be counted among despatch days although Sundays were excluded from lay days.

Laing v. *Hollway* (1878) 3 Q. B. D. 437, and *In re Royal Mail Steam Packet Co. and River Plate Steamship Co.* [1910] 1 K. B. 600, followed.

The Glendevon [1893] P. 269, and *Nelson & Sons* v. *Nelson Line, Liverpool* [1907] 2 K. B. 705, distinguished.

AWARD in the form of a special case.

By a charterparty dated March 13, 1913, it was agreed between the Mawson Shipping Company, Limited (hereinafter called "the owners"), and Mr. P. Beyer, of Novorossisk (hereinafter called "the charterer"), that the steamship *Thirlwall* should

proceed to Novorossisk and load a cargo of wheat and/or grain and/or seed upon the terms and conditions therein mentioned.

The special case contained the following material clauses:—

"2. By clause 6 of the said charterparty it was provided as follows:—

"The entire cargo shall be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted). Time for loading to count from 6 A.M. in summer and 8 A.M. in winter of the morning after steamer's arrival whether in berth or not, she being then in free pratique cleared by the Customs and ready to load in all her holds and notice of readiness given, such notice to be given between the hours of 9 A.M. and 5 P.M. on ordinary working days.

"A non-working holiday shall be a day upon which all the banks are closed.

"Charterers have the right of working during the excepted periods without counting the time they paying all extra expenses incurred thereby.

"3. By clause 9 it was provided that if the steamer should be longer detained than the time stipulated as above mentioned demurrage should be paid.

"4. By clause 24 of the said charterparty it was provided as follows:—

"Owners agree to pay charterers 10*l.* (say ten pounds) per day for all time saved in loading.

"5. By clause 21 of the said charterparty it was provided that in the event of any dispute arising thereunder it was to be referred to two arbitrators in London with power to such arbitrators in case of disagreement to appoint an umpire whose award shall be final."

The special case proceeded to state that a dispute had arisen between the charterer and the owners with regard to a claim by the owners for 10*l.* in respect of one day's despatch money which the charterer had deducted in his account with the owners. Arbitrators and an umpire were appointed. On the hearing of the reference both parties applied to the umpire to state a case for the opinion of the Court, and he therefore stated his

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

award in the form of a special case, finding the facts to be as hereinafter set out.

"10. The cargo loaded consisted of five thousand one hundred and forty two units and it was agreed that the charterer was entitled to ten and a half days for loading the said cargo and that the lay days began to count at 8 A.M. on Thursday, March 20. March 23 was a Sunday and the loading was finished at 8 A.M. on Wednesday, March 26, so that excluding the Sunday it was agreed between the parties that five days had been occupied in loading.

"11. The charterer claimed that, as the remaining five and a half lay days (excluding Sundays) if used would have expired only at 8 P.M. on Tuesday, April 1, he was entitled to be paid six and a half days' despatch money at the rate of ten pounds a day. The owners admitted their liability for five and a half days, but disputed their liability for the remaining day on the ground that it was a Sunday and was excluded from the lay days and therefore was equally excluded from the despatch days.

"12. A true copy of the said charterparty is annexed to this case and may be referred to as part thereof.

"13. The question for the opinion of the Court is whether on the proper construction of the said charterparty the charterer or the owners are right in their respective contentions with regard to the Sunday March 30 counting as a despatch day so as to entitle the charterer to ten pounds in respect thereof.

"14. If the Court shall be of opinion that the owners are right in their contention then I do award and direct that the owners recover from the charterer the sum of ten pounds . . . .

"15. If the Court on the other hand should be of opinion that the charterer is right in his contention then I do award and direct that the owners do recover nothing from the charterer . . . .

"As witness" &c.

A. Neilson, for the owners. The question is what is meant by "10*l.* per day for all time saved in loading." That depends on what the word "day" means in this charterparty. The

meaning is to be found in clause 6 of the charterparty, stated in paragraph 2 of the special case. Running day means a day of twenty-four consecutive hours, Sundays excepted. It follows that Sunday, March 30, is not to be counted as time saved: *The Glendevon* (1); *Nelson & Sons* v. *Nelson Line, Liverpool.* (2)

A. H. Chaytor, for the charterer. Time saved means shipowners' time saved, and that includes Sundays and holidays even though they be excluded from the lay days: *Laing* v. *Hollway* (3); *In re Royal Mail Steam Packet Co. and River Plate Steamship Co.* (4) In *Nelson & Sons* v. *Nelson Line, Liverpool* (2) the Court of Appeal held (Fletcher Moulton L.J. dissenting) that in the particular charterparty there in question the words "each clear day saved in loading" contained a pointed reference to lay days, or days from the charterers' point of view, which excluded Sundays. That is not so in this charterparty, which in its terms is much more like the charterparty in *Laing* v. *Hollway.* (3)

Cur. adv. vult.

Nov. 14. BAILHACHE J. read the following judgment:—This case stated by an umpire raises a question as to how days are to be reckoned for the purpose of paying despatch money arising in a case where the charterparty provides for lay days subject to exceptions such as Sundays and holidays. Is despatch money payable in respect only of lay days saved or in respect of all time saved to the ship? In other words is despatch for this purpose on the same footing as demurrage? The question has been decided by the Courts both ways.

The despatch clause itself is usually quite short and in much the same form; the words which have caused the difficulty as far as they have been before the Courts are "any time saved in loading and/or discharging," "if sooner discharged," "each clear day saved in loading," "each running day saved," and the words in the present case are "all time saved in loading."

I do not think that a shipowner or charterer would see any

(1) [1893] P. 269.
(2) [1907] 2 K. B. 705.
(3) 3 Q. B. D. 437.
(4) [1910] 1 K. B. 600.

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

Bailhache J.

material difference between any of these forms of expression except perhaps in the one "each running day saved." Some of them do not contain the words "in loading or discharging"; but as in practice the only way in which a charterer can save time is in loading or discharging, these words do not seem to add to or detract from the expression "time saved."

I reserved judgment in order to see if in view of the conflicting decisions I could discover and enunciate any principle which might be of use to owners or charterers having occasion to use or construe despatch clauses in the future and might serve them as a guide, of course so far only as the opinion of a judge of first instance can serve in that direction. This has involved a critical consideration of the decided cases which I propose to make at the risk of being tedious.

In the present case the matter arises in this way. By a charterparty dated March 13, 1913, the steamship *Thirlwall* was chartered by her owners to a Mr. Beyer for a voyage. By clause 6 the entire cargo was to be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted). By clause 9, if the steamship was longer detained demurrage was to be paid at a certain rate per running day, and clause 24, a written clause at the end of the charterparty, ran "Owners agree to pay charterers 10*l*. per day for all time saved in loading." The cargo consisted of 5142 units, which gave ten and a half lay days, and they began to count on Thursday, March 20, at 8 A.M., and occupied five lay days, expiring on Wednesday, March 26, at 8 A.M., the intervening Sunday being of course excluded. The remaining five and a half lay days, if used, would have expired on Tuesday, April 1, because Sunday, March 30, would not have counted. The charterers contended that they were entitled to six and a half days' despatch money. The owners contended that they were only liable for five and a half days' despatch money, upon the ground that as Sunday, March 30, was not a lay day it did not count for the purpose of calculating despatch money. Their contention was that time saved means lay days saved.

The first reported case on the subject is in 1878—*Laing* v.

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

Bailhache J.

Hollway. (1) In that case demurrage and despatch were dealt with in one clause, and omitting unnecessary words, the clause ran "Demurrage, if any, at the rate of 20*s.* per hour . . . . Despatch money 10*s.* per hour on any time saved in loading and for [qu. $\frac{\text{and}}{\text{or}}$] discharging." By an earlier clause the cargo was to be loaded "at the rate of 200 tons per running day (Sundays and holidays excepted) and to be discharged as fast as ship can deliver, not exceeding 200 tons per working day, weather permitting." Four days were saved in loading and five days in discharging. The point there raised was not quite the same as here. No one suggested that a Sunday did not count for despatch, but the shipowners contended that a lay or working day was a day of twelve hours and that what had been saved was nine working days of twelve hours each, that is to say, 108 hours. The charterers contended that they had in fact saved to the ship nine days of twenty-four hours each, that is, 216 hours. The Court held that there was no ground for the suggestion that the length of a lay or working day was twelve hours; they held that "time saved" meant time saved to the ship and gave judgment for the charterers. Bramwell L.J. said in delivering the judgment of the Court (2): "It is admitted on both sides, and is clear, that 'time saved' means if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only, all the time by which she is the sooner ready is time saved within the meaning of the charterparty. Then the question is by how much time is she sooner ready? The answer is in nine times twenty-four hours. Really the reason of the thing is that way. The owner would sail away by what has happened 216 hours sooner than he would have done, but for the defendants' despatch." And later on he says (3): "It was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the despatch money?" The Court having held against the contention that a working day meant a day of twelve hours, it may be said, as Bray J. said in a later case, that the rest of the judgment is obiter. It may be so, but the judgment is a reasoned judgment

(1) 3 Q. B. D. 437. (2) 3 Q. B. D. at p. 441.
(3) 3 Q. B. D. at p. 442.

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

Bailhache J.

on the construction and object of the clause and purports to lay down a principle.

It is to be observed that Bramwell L.J. uses language which it is hard to distinguish from "if sooner despatched," which are the words in the next case. That case is *The Glendevon.* (1) It came before a Divisional Court in admiralty. There the discharging and despatch were dealt with in one clause which provided "steamer to be discharged at the rate of 200 tons per day weather permitting (Sundays and fête days excepted) according to the custom of the port of discharge and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved." In the time saved were a fête day and a Sunday, and the charterers claimed despatch money in respect of them. The Court held that they were wrong. The main reason apparently why the Court so held was because the lay days were weather working days, and the argument advanced by the owners was that if before the end of the lay days the weather became too bad to work, the lay days would thereby be indefinitely extended, it might be for weeks, and the charterers would be able to claim despatch money until the weather became fine again. Fletcher Moulton L.J. deals with this point in *Nelson & Sons* v. *Nelson Line, Liverpool* (2), and I have nothing to add to what he there says.

Another point taken by the President was that the demurrage clause was a separate clause and contained no exceptions, and that as the lay day and despatch clause were one clause, and that clause contained exceptions to the lay days, those exceptions must be taken as equally applying to despatch days.

The next case is *Nelson & Sons* v. *Nelson Line, Liverpool.* (2) There the lay days, demurrage, and despatch were all dealt with in one clause which runs "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading . . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* per day . . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" The same question arose. The days saved extended over a

(1) [1893] P. 269. (2) [1907] 2 K. B. 705.

Sunday. The charterers claimed in respect of it, and this claim was disallowed by the Court, Fletcher Moulton L.J. dissenting. The judgment of the Court on this point was delivered by Buckley L.J., who held that *The Glendevon* (1) was rightly decided, and that *Laing* v. *Holloway* (2) was also rightly decided, but had no bearing upon the point raised in that case. The reason for his judgment is I think to be found in these sentences: "The relevant words are 'seven days to be allowed for loading' and 'for each clear day saved in loading' the charterers shall be paid. In this language no trace is to be found of saving delay to the ship." (3)

The last case is *In re Royal Mail Steam Packet Co. and River Plate Steamship Co.* (4) There again, as in the last case, loading, demurrage, and despatch were dealt with in the same clause. The relevant words are "fourteen running days . . . . shall be allowed the charterers (holidays and time between 1 P.M. Saturdays and 7 A.M. Mondays excepted) for the loading of the cargo, and all days on demurrage over and above the said lay days shall be paid for at the rate of 33*l.* per running day"; there was a similar provision as to discharging, and the clause went on "the owners of the ship to pay 10*l.* per day despatch money for each running day saved. Parts of days to count as parts of days, and demurrage or despatch money to be paid pro rata." The question there was as to Sundays and also as to time between 1 P.M. on Saturdays and 7 A.M. on Mondays, the charterers claiming payment and the owners resisting. Bray J. held the charterers were right.

It is to be observed in this case that although the form of the clause and the collocation of words was the same as in *Nelson & Sons* v. *Nelson Line, Liverpool* (5), in the last part of the clause, for the purpose of pro rata payment, demurrage and despatch are treated as on the same footing. Bray J. held, notwithstanding this fact, that he was not bound to qualify the despatch words "each running day saved" by importing into them the words of exception from lay days, although the lay days

(1) [1893] P. 269.
(2) 3 Q. B. D. 437.
(3) [1907] 2 K. B. at p. 725.
(4) [1910] 1 K. B. 600.
(5) [1907] 2 K. B. 705.

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

Bailhache J.

were spoken of as running days; and he took occasion to express his concurrence with the dissentient judgment of Fletcher Moulton L.J. in *Nelson & Sons* v. *Nelson Line, Liverpool.* (1) With that expression of approval I desire to associate myself. I should, I fear, have decided all the four reported cases in favour of the charterers.

It would serve no useful purpose and would perhaps be hardly respectful to criticize the judgment of the Court in *The Glendevon* (2) and Buckley L.J. in *Nelson & Sons* v. *Nelson Line, Liverpool* (1); but if the test is, as Buckley L.J. says, whether there is to be found in the language used a trace of saving delay to the ship, I should have thought that in all the cases more than a trace is to be found in that part of the language used which provides that the ship is to pay; and in *The Glendevon* (2) in particular in the words "if sooner discharged" I should not have found a trace of anything else. Accepting, however, as I must and do, the authorities as they stand, I think, I may with safety say that the conclusions to be drawn from them are:

1. Prima facie the presumption is that the object and intention of these despatch clauses is that the shipowners shall pay to the charterers for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated; that is, taking no account of the lay day exceptions: *Laing* v. *Hollway* (3) and *In re Royal Mail Steam Packet Co. and River Plate Steamship Co.* (4)

2. This prima facie presumption may be displaced, and is displaced, where either (i.) lay days and time saved by despatch are dealt with in the same clause and demurrage in another clause: *The Glendevon* (2); (ii.) lay days, time saved by despatch, and demurrage are dealt with in the same clause, but upon the construction of that clause the Court is of opinion, from the collocation of the words or other reason, that the days saved are referable to and used in the same sense as the lay days as described in the clause, and are not used in the same sense as days lost by demurrage: *Nelson & Sons* v. *Nelson Line, Liverpool.* (1)

(1) [1907] 2 K. B. 705.
(2) [1893] P. 269.
(3) 3 Q. B. D. 437.
(4) [1910] 1 K. B. 600.

1913

MAWSON SHIPPING COMPANY, LIMITED v. BEYER.

Applying these rules to the present case it falls within the first class. There is nothing to rebut the prima facie meaning and object of the clause, and I decide in favour of the charterers. I ought to add that I am not at all surprised that in the state of the authorities on the subject the umpire decided in favour of the shipowners.

Award in favour of charterers.

Solicitors for shipowners: *Botterell & Roche.*

Solicitors for charterer: *Thomas Cooper & Co.*

W. H. G.

HALE *v.* MORRIS & SONS, LIMITED.

1913
Oct. 16.

Revenue—Manufacturer of Tobacco—Possession of Tobacco which on being dried at Temperature of 212 *deg. Fahr. decreases in Weight by more than* 32 *per cent.—Customs and Inland Revenue Act,* 1887 (50 *&* 51 *Vict. c.* 15), *s.* 4—*Finance Act,* 1904 (4 *Edw.* 7, *c.* 7), *s.* 3, *sub-s.* 2.

By s. 4 of the Customs and Inland Revenue Act, 1887, it is provided that if any manufacturer of tobacco shall have in his . . . . possession any tobacco . . . . and such tobacco shall on being dried at a temperature of 212 deg. Fahr. be decreased in weight by more than 35 (altered by the Finance Act, 1904, to 32) per cent., he shall be subject to a penalty, and the tobacco shall be forfeited.

Two officers of Customs and Excise visited the respondents' (who were manufacturers of tobacco) premises and took a sample of tobacco of about two ounces from a "cob" (i.e., a small truss weighing about 5 lbs.). The "cob" with several others was in a large tub which contained 60 or 70 lbs. of tobacco. Each of two portions of this sample when dried at a temperature of 212 deg. Fahr. was found to contain 33·7 per centum of moisture (i.e., 1·7 per centum in excess of the limit allowed by the statute). The two portions weighed about half an ounce each. The remainder of the sample was not tested. The sample did not in fact fairly represent the bulk of which it was intended to be a sample, and the tobacco in the tub as a whole did not contain more moisture than was allowed by law. The tobacco is ordinarily sold by the retailer by the ounce or half-ounce:—

Held, that the respondents had committed an offence under the section in respect of the ounce of tobacco which was found to contain more moisture than was allowed by law, inasmuch as the words "any tobacco" covered any quantity which was not too small to be recognized, or which was large enough to be dealt in by the public.

CASE stated by a metropolitan magistrate.

The respondents appeared before the magistrate on February 18 and March 11, 1913, to answer an information laid by the

1913

HALE v. MORRIS & SONS, LIMITED.

appellant, an officer of Customs and Excise, acting therein under the order of the Commissioners of Customs and Excise, for that the respondents being manufacturers of tobacco on November 8, 1912, had in their custody and possession certain tobacco, to wit, cut tobacco fit for sale, and that such tobacco on being dried at a temperature of 212 degrees as denoted by Fahrenheit's thermometer was decreased in weight by more than 32 per centum contrary to the form of the statute in that case made and provided, whereby the respondents had for such offence incurred an Excise penalty of 50*l.*

The proceedings on the information were for the recovery of the penalty of 50*l.* imposed by s. 4 of the Customs and Inland Revenue Act, 1887, as amended by sub-s. 2 of s. 3 of the Finance Act, 1904. (1)

Upon the hearing of the information the following facts were proved or admitted :—

The respondents are an incorporated company, to which the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), applies, and carry on the business of manufacturers of tobacco at certain premises known as 21 to 29, Mansell Street, London, E.

On November 8, 1912, the respondents had in their possession

(1) Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15), s. 4: "If any manufacturer of tobacco shall have in his custody or possession any tobacco (except tobacco which must undergo some process of treatment or manufacture before it is fit for sale), or if any dealer in or retailer of tobacco shall have in his custody or possession any tobacco, and such tobacco shall in either case on being tried at a temperature of two hundred and twelve degrees as denoted by Fahrenheit's thermometer be decreased in weight by more than thirty-five per centum he shall incur an excise penalty of fifty pounds and the tobacco shall be forfeited.

"Roll tobacco or cut tobacco in the custody or possession of a manufacturer of tobacco which is treated in the course of manufacture by baking, or hot pressing, or stoving, shall be deemed fit for sale when the same has cooled after such treatment, and roll tobacco in such custody or possession, which is treated in the course of manufacture by pressing merely, shall be deemed fit for sale immediately upon being put in press."

By the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 2, "thirty per centum" was substituted for "thirty-five per centum," and by the Finance Act, 1904 (4 Edw. 7, c. 7), s. 3, sub-s. 2, s. 2 of the Finance Act, 1898, was repealed and "thirty-two per centum" was substituted for "thirty-five per centum."

in a large tub on their premises a quantity of cut tobacco fit for sale known as Dark Budget Shag. This cut tobacco had been manufactured from leaf tobacco by a process which may be shortly described as follows. The leaves with their natural moisture are sprinkled with water to an extent which in the judgment of the operator will secure that, at the completion of the ordinary drying process, the amount of moisture in the tobacco shall be as nearly as possible 31 per cent. They are then left for twenty-four hours, when they are cut up by a machine. The tobacco is then steamed and put upon a hot plate in a layer about two inches thick and dried, then the layer is turned over on the hot plate and further dried. The dried tobacco is then laid out on racks, stacked and cooled. It is then put into "cobs," i.e., small trusses weighing about 5 lbs. each, and the "cobs" are placed in layers in large tubs, each containing about 120 lbs. of tobacco on an average, and the tobacco is delivered from those tubs to dealers in tobacco in weights never less than 1 lb. and is sold by them to the public in quantities at least as small as one ounce. When tobacco is required for a customer it is usually taken from the top of the tobacco in the tub, and the tub is thus gradually emptied.

Between 9 and 10 A.M. on November 8 Mr. Ockenden, a surveyor of Customs and Excise, called at the respondents' premises and took from the top of the tub about one ounce of tobacco as a sample for examination. This sample was found on being dried at a temperature of 212 degrees as denoted by Fahrenheit's thermometer to be decreased in weight by 29·5 per centum.

Immediately after Mr. Ockenden had taken his sample the foreman of the respondents' cutting department took a sample from the same tub, and the figure of decrease for this sample was afterwards found by the foreman to be 30·25.

Between noon and 2 P.M. on the same day two other officers of Customs and Excise (Nolan and Secker) visited the respondents' premises for the purpose of examining tobacco. By this time 50 or 60 lbs. of tobacco had been delivered from the tub to customers, so that the "cobs" then at the top of the tobacco were "cobs" which at the beginning of the day had been some distance down

1913

HALE v. MORRIS & SONS, LIMITED.

in the tub. Nolan and Secker felt with their hands both the tobacco at the top and the tobacco lower down in the middle of the tub, and judging by the feel that the tobacco contained too much moisture, they took a special sample of about two ounces, wrapped it up in lead foil, and took it away for examination at the Government laboratory. According to the evidence of Nolan and Secker this special sample was taken out of the top cob two or three inches down from the outside layer of the cob. The tobacco in the centre of the cob would usually be moister than the tobacco on the outside of the cob. The officers said in the witness-box that they took this sample from the top cob because it felt the same as regards moisture as the tobacco lower down in the cask. On examination in the Government laboratory, the figure of decrease for each of two portions of this sample was found to be 33·7 per centum, i.e., 1·7 per centum in excess of the limit allowed by Act of Parliament. Each of the two portions just referred to was about half an ounce, and the remaining one ounce of the sample was not tested.

The witnesses for the respondents asserted that Nolan and Secker took their sample from the middle of a cob in the middle of the tub, and so probably obtained the dampest part of the bulk in the tub.

Before taking the special sample the two officers informed the respondents' manager of their intention to take it, and immediately after it was taken the respondents' foreman also took a sample from the same "cob." The foreman afterwards divided the sample into two parts and dried them separately; one of these parts gave a figure of decrease 31 per centum and the other a figure of decrease 31·9 per centum.

This quality of tobacco is ordinarily sold by the retailer by the ounce or half-ounce, but is never sold in packets.

On behalf of the appellant it was contended that s. 4 of the Customs and Inland Revenue Act, 1887, was intended to secure that tobacco in a saleable state should be of standard dryness throughout; that the two ounces of tobacco in respect of which the unlawful decrease was proved, or alternatively the two half-ounce portions which were analysed, were a sufficient quantity to satisfy the words "any tobacco" in s. 4; that at

any rate on the evidence there was sufficient over-moist tobacco in the tub to satisfy those words; and that on the facts proved the respondents had incurred a penalty.

On behalf of the respondents it was contended that the percentage of moisture found in the portions of the sample of two ounces taken by the two officers did not represent the percentage of moisture in the bulk which was in the tub when the special sample was taken, and that it was impossible to secure a uniform dryness throughout in tobacco containing moisture. It was also contended that if the word "any" was taken in its literal sense it would be an offence for a tobacco manufacturer to have in his possession any quantity of tobacco, however small, if even a microscopic shred of it contained a slightly excessive amount of moisture.

The magistrate found as a fact that the two half-ounces of tobacco, part of the special sample taken by the two officers and actually tested, contained an unlawful amount of moisture, namely, 1·7 per centum in excess of the percentage of decrease allowed by law; and probably the rest of the special sample was in the same condition. He further found that the special sample was fairly taken in the sense that the officers did not intend to be unfair, but that it did not in fact fairly represent the bulk of which it was intended to be a sample, and that neither the tobacco in the tub as a whole nor any substantial portion of it contained more moisture than was allowed by law. No particular amount of tobacco was named in the summons as being too damp. At the beginning of the trial the magistrate understood the allegation of the prosecution to be that the bulk of the tobacco in the tub was shewn by the sample to be too damp. At the close of the trial he asked the solicitor for the prosecution how much he alleged was too damp and he replied at least one ounce.

The magistrate was of opinion that he ought not to convict unless it was shewn that at least some substantial proportion of the bulk tested contained too much moisture, and he was not satisfied that more than one or two ounces out of some 60 or 70 lbs. contained too much moisture. He therefore dismissed the information. He further stated that if he had

1913

HALE v. MORRIS & SONS, LIMITED.

thought he was bound in law to convict he should have inflicted a nominal penalty.

The question for the opinion of the Court was whether upon the facts he was bound in law to convict.

Sir J. A. Simon, S.-G., and *Daldy*, for the appellant. The question turns upon the true construction of s. 4 of the Customs and Inland Revenue Act, 1887, as amended by s. 3, sub-s. 2, of the Finance Act, 1904. The word "any" in s. 4 of the Act of 1887 is not confined to tobacco in bulk. It is sufficient if the specimen of the tobacco taken by the Excise officers contains more moisture than is allowed by the statutes. It cannot have been intended by the Legislature that no account should be taken of an ounce of tobacco, although it contains more moisture than is allowed by law. The question is whether the manufacturer has any tobacco in his custody or possession which is too damp. A dealer deals in large quantities of tobacco, and a retailer in small quantities. If two ounces of the tobacco were too damp it is no answer to say that some other quantity was not too damp. [The Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 8, was also referred to.]

Danckwerts, K.C., and *H. Curtis Bennett*, for the respondents. It is quite impossible to keep the proportion of moisture in tobacco at the same limit. Moisture in the atmosphere has the effect of making tobacco damp. This difficulty has been felt by the Legislature, and from time to time the percentage of moisture allowable in tobacco has been varied. The object of taking a sample is to test the bulk and to see that nothing but water has been used in manufacturing the tobacco. Sect. 7 of the Tobacco Act, 1842 (5 & 6 Vict. c. 93), permits an officer of Excise to take a sample or samples of any tobacco, and s. 6 of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), enables any officer of Inland Revenue to take samples of any goods or commodities chargeable with any duty of Excise or Customs. Similar powers are conferred with respect to samples of worts or beer or materials for brewing by s. 26 of the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20). The principle underlying those provisions is the

same as that of s. 4 of the Customs and Inland Revenue Act, 1887, namely, that the sample shall fairly represent the whole of which it is a sample, and s. 42, sub-s. 1, of the Spirits Act, 1880 (43 & 44 Vict. c. 24), provides that the gravity or strength of any sample of spirits, &c., taken by an officer shall be deemed the gravity or strength of the whole contents of the vessel from which it is taken, the object of that provision being to exclude the question whether it is a fair sample or not. The effect of ss. 1 and 4 of the Tobacco Act, 1842, and s. 27 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), is that a manufacturer of tobacco is compelled by law to use water only in manufacturing tobacco, except in the case where essential oil or olive oil is permitted. The object of samples being taken is that the Excise officers should be relieved from the burden of testing the whole of the bulk. In the case of spirits the officer's selection is by s. 42, sub-s. 1, of the Spirits Act, 1880, made conclusive evidence that the sample is a fair specimen of the whole. But underlying that provision is the implication that the sample must fairly represent the whole bulk. Under the Customs and Inland Revenue Act, 1887, the officer is not entitled to take a sample unless it is a fair sample of the whole bulk. In s. 4 of the Act the words are "such tobacco," not "such tobacco or any part thereof." If a fair sample is taken and it is condemned the whole bulk of tobacco from which the sample was taken is condemned. The Legislature must have intended to treat the manufacturer in a reasonable manner, and it would not be reasonable to convict a manufacturer for having a few ounces of tobacco in his possession which is too damp, although it might be reasonable in the case of a retailer. The words "any tobacco" in s. 4 mean any tobacco which is the result of one process of manufacture—what may be called one "shot." The question for a jury would be whether in any reasonable sense the tub of tobacco as a whole contains more moisture than 32 per cent. If the sample is a fair one the question is answered quite easily. In a penal statute the view most favourable to the person subject to the penalty must be taken. [Sect. 1 of the Manufactured Tobacco Act, 1863 (26 & 27 Vict. c. 7), was also referred to.]

1913

HALE v. MORRIS & SONS, LIMITED.

RIDLEY J. This case has been argued very ably by Mr. Danckwerts on behalf of the respondents, but we are of opinion that it was the duty of the magistrate to convict, not in respect of the tub or the "cob" containing more moisture than was allowed by the Customs and Inland Revenue Act, 1887, as amended by the Finance Act, 1904, but in respect of the portion which was proved to contain more moisture than was allowed by those statutes. The question turns upon the true construction of the words "any tobacco" in s. 4 of the Customs and Inland Revenue Act, 1887.

The material facts are that of one particular cob two samples were taken, one by the respondents' foreman and the other by officers of Customs and Excise.

That taken by the officers was a special sample of two ounces, and of this sample two portions of half an ounce each were found on being dried at a temperature of 212 deg. Fahr. to be decreased in weight by more than 32 per cent., the maximum allowed by the statutes. The two parts into which the sample taken by the respondents' foreman was divided contained less moisture than 32 per cent., but the average of the four parts was over 32 per cent. The magistrate found that the tobacco in the tub as a whole did not contain more moisture than was allowed by law, nor, he found, did any substantial portion of it.

I do not think that the sentence in the magistrate's finding "nor any substantial portion of it" is properly used, because the word "substantial" would, I think, include such an amount as an ounce; but I understand him to mean that the tub, as a whole, was not proved to have contained more moisture than it ought to have contained, and he therefore dismissed the summons, holding that the bulk was not fairly represented by the sample. That is the reasoning upon which the magistrate based his decision, and which Mr. Danckwerts on behalf of the respondents invites us to follow. I do not think that the question whether the bulk corresponds with the sample arises. On behalf of the respondents it is contended that there is a bulk with which the sample must correspond. I ask, What is that whole or bulk with which the sample has to correspond? It is nowhere

mentioned in the Customs and Inland Revenue Act, 1887. There is no word referring to it in s. 4 of that Act which can assist us in arriving at a conclusion as to what the whole or bulk is. There is indeed in the Spirits Act, 1880, s. 42, sub-s. 1, the provision that "an officer may take a sample of any wort, wash, low wines, feints or spirits from any vessel or utensil in a distillery and the gravity or strength of any sample so taken shall be deemed the gravity or strength of the whole contents of the vessel or utensil from which it is taken." But there is an absence of any such provision in the Customs and Inland Revenue Act, 1887. There are also in s. 7 of the Tobacco Act, 1842, and in s. 26 of the Inland Revenue Act, 1880, and s. 6 of the Customs and Inland Revenue Act, 1888, provisions which enable officers of the Excise and Inland Revenue to take samples.

On behalf of the respondents Mr. Danckwerts contended that the Legislature must have intended that the sample taken should be such as mercantile people understand, i.e., the sample must correspond with the bulk. I do not think that that contention reasonably applies to Revenue Acts which have for their object the prevention of goods being sold which are not in a certain condition; and it may perfectly well be that it was the intention of the Legislature that there should be none of the tobacco that contains more moisture than the amount specified, and not merely that upon the average the bulk should not so contain it. There is nothing to shew that that is not the intention of the Legislature, and the words of the statute seem to me to mean it.

Mr. Danckwerts contended that the sample must be so taken that it represents substantially the whole of the tobacco. He must first shew what is the whole of the tobacco, and I do not think that he has satisfied the Court—certainly he has not satisfied me—as to what the bulk of the tobacco is. It seems to me, according to the statement in the case, that the only unit to be found, if there is such a thing, is the cob, because that is the quantity in which it is made up, and the cobs are simply put together in a certain number, amounting to what is called a tub. But the mere fact that a difficulty is found at the outset, that it is not known what the whole or bulk is, is sufficient to throw a great deal of doubt upon his argument. Is the whole or bulk to

1913

HALE v. MORRIS & SONS, LIMITED.

Ridley J.

be taken as a cob or as a tub? I do not think that that is really the way in which the statute can be properly explained. Read in that way it will give rise to difficulties in every case which occurs. There is another way of reading it which recommends itself to me, and I believe to the Court, and it is this—that when the statute says that "if a manufacturer of tobacco has in his custody any tobacco," it means any portion of tobacco which is not so small as not to be recognized, any portion with which the public may deal. It then becomes a substantial portion of the tobacco. If it is merely one or two ounces which the manufacturer so has in his possession, it is a trivial offence and it ought, as the magistrate said, to be so treated; yet it is an offence against the statute, because he has had in his custody a portion of tobacco not so small as not to be recognized, large enough to be dealt in by the public. Therefore it is a small offence, but it is nevertheless an offence. The magistrate has said that because the small portion—an ounce I will call it—which offended did not represent the whole portion of the bulk, though he does not find what the bulk was, he ought to dismiss the summons. I think that is wrong and that he ought to have convicted with a nominal penalty.

SCRUTTON J. I am of the same opinion, and as we are differing from the learned magistrate I think it right to put my views in my own words. The summons taken out against the respondents raises the question whether they had in their possession "any tobacco" which on being dried at a temperature of 212 deg. Fahr. was decreased in weight by more than 32 per cent., and the facts are that on the morning of a particular day there was a tub of about 120 lbs. of tobacco in their possession, of which samples taken at the top did not offend against the statute, but later in the day, when the tub of 120 lbs. had been reduced by sales to 60 or 70 lbs., tests were again taken, and four portions of two samples from the same cob averaged over 32 per cent. of moisture. Two of them were under 32 per cent. and two of them were over 32 per cent. and the four averaged over 32 per cent. The summons did not state for what tobacco the respondents were being summoned

1913

HALE v. MORRIS & SONS, LIMITED.

Scrutton J.

—for how much—and the magistrate says: "No particular amount of tobacco was named in the summons as being too damp. At the beginning of the trial I understood the allegation of the prosecution to be that the bulk of the tobacco in the tub was shewn by the sample to be too damp. At the close of the trial I asked the solicitor for the prosecution how much he alleged was too damp and he replied at least one ounce. I was of opinion that I ought not to convict unless it was shewn that at least some substantial proportion of the bulk tested contained too much moisture and I was not satisfied that more than one or two ounces out of some 60 or 70 lbs. contained too much moisture. I therefore dismissed the information." I think that the principle on which the learned magistrate acted was erroneous. The words of the section are "If any manufacturer . . . . or retailer . . . . shall have in his custody or possession any tobacco." On behalf of the respondents Mr. Danckwerts did not contend that the words "any tobacco" mean all the tobacco which the manufacturer has in his possession, but that they mean in the case of a manufacturer the produce of one manufacturing operation, and the produce, say 120 lbs., is to be taken and looked at in the bulk. It is difficult to understand how that contention can be upheld with regard to a retailer, because one manufacturing operation has no application in that case whether the word "any" means that all the tobacco he has in his possession at one time must be looked at or whether varying portions may be looked at. But I find no warrant in the statute for placing such a limitation upon the meaning of the word "any." There is the limitation de minimis non curat lex, and a microscopic shred of tobacco would not in my opinion be "any tobacco" for the purpose of the section; but I think that "any tobacco" means any substantial portion of tobacco having regard to the ordinary retail sale of tobacco.

The magistrate has not applied that principle. He has said in effect "I must look at the whole bulk of the tobacco and see whether the portion tested is any substantial proportion."

Now we are not interfering with the view of the magistrate as to the facts. He says that the sample did not in fact fairly

1913

HALE v. MORRIS & SONS, LIMITED.

Scrutton J

represent the tub. If it did not—and he is the judge of that—it is clear there can be no conviction in regard to the tub. But he finds that at least two ounces were too wet; and I do not quite understand why, except that he did not address his mind to the point, he does not find that one cob of which four portions of the two samples averaged over 32 per cent. was too wet. If it is one cob—5 lbs.—it seems to me quite clear that that is "any tobacco," as it is a substantial portion of tobacco having regard to the ordinary use of tobacco. But, further, having regard to the admission on both sides that this tobacco is sold by the ounce, it appears to me that two ounces is a substantial portion of tobacco for the purpose of the section, though I quite agree that, if the magistrate had convicted for two ounces, he would probably have inflicted a nominal penalty. I think the principle upon which he proceeded was wrong and that the true principle is that the words "any tobacco"—whether in the hands of the manufacturer or dealer—mean a substantial portion having regard to the ordinary retail sale of tobacco. Such a substantial proportion was in fact found excessive in moisture within the statute, and therefore there should have been a conviction; but I entirely agree as to the nominal penalty which the magistrate would probably inflict.

BAILHACHE J. I am of the same opinion and for the same reasons which have been expressed by my brother Scrutton; but I should like to say a word about the argument which Mr. Danckwerts has addressed to us in support of the magistrate's decision. Mr. Danckwerts contended, as I understood him, that in dealing with a manufacturer of tobacco different considerations have to be applied under the section from those which have to be applied in dealing with a retailer of tobacco. He contends that in the case of a retailer of tobacco, if he was found in possession of and ready to sell an ounce that was too wet, he could be properly convicted under this section, but in the case of a manufacturer of tobacco quite different principles have to be applied. I understand him to base that contention upon the following reasons. He says, You take from the manufacturer a sample, and the only object of taking a sample is that it should

represent—and it must be taken to represent—the bulk; and that a person is not to be convicted under these statutes because the sample is wrong; he is convicted only because the sample represents a larger bulk, and that the bulk in this case is to be taken as the quantity of tobacco which is the result of one manufacturing process, or, as he termed it, one "shot." And then he says that if the sample condemns the whole bulk, the manufacturer is rightly convicted, but not otherwise; and he supports his argument by this—which is a strong observation in his favour—that conviction is followed by confiscation, and he asks, if you get in this case a couple of ounces which are too wet, what are you going to confiscate? Are you going to confiscate only the couple of ounces, or the bulk of the tobacco? He contends that the section in the case of the manufacturer clearly contemplates not the confiscation of the small portion simply which may be found to be too wet, but the tobacco—i.e., "such tobacco"—which is mentioned in the earlier part of s. 4 of the Customs and Inland Revenue Act, 1887, and which means the "shot" or quantity of tobacco which is the result of one manufacturing process and which in this case is the tub—120 lbs.

I listened to that argument with the greatest attention and I hope I understood it, but I do not agree with it. I think it is perfectly true to say that in the case of tobacco you could not, upon a sample of two ounces, condemn and confiscate the whole tub, but I do not think it is true to say that you do not therefore commit any offence under the section.

Tobacco is not like some articles from which it is quite easy to take a small sample of a considerable bulk. There are certain liquids which can be dealt with in that way, and corn is constantly so dealt with. Tobacco is different for the reason that it absorbs moisture in varying degrees and the same tobacco absorbs moisture in different degrees at different times. Therefore you cannot very well by taking an ounce out of a cob produce a sample which can be fairly said to represent the whole of the tub. But in this particular case the tub of tobacco of 120 lbs. when it is ready for sale is divided into what are called trusses or cobs of 5 lbs. each. And in this particular instance two samples were taken from one particular cob, and the average

1913

HALE v. MORRIS & SONS, LIMITED.

Bailhache J.

amount of water in four portions of those samples was approximately 32·6 per cent., that is to say, ·6 per cent. above the statutory limit, and I am entirely unable to see how upon the evidence before the learned magistrate he could not if he chose—and I think he ought to have done so—convict in respect of that particular cob from which those samples were taken. It seems to me that that particular cob was proved to demonstration to be too wet, and if I had been the magistrate and of the same opinion that I am now, I should have convicted, not in respect of the two ounces which were the samples taken by the revenue officers, but in respect of the cob from which the four portions of the two samples were taken. When a conviction is obtained in respect of that particular cob it seems to me impossible to say that it is a quantity so small that the law will take no notice of it.

I agree with my brother Scrutton's observations as to the two ounces. In my view it is not true to say that a manufacturer does not commit an offence under this section unless the whole contents of one "shot" or tub are too wet. He commits an offence under the section in my judgment if he has "any"—that is to say any appreciable—quantity of tobacco for sale on his premises which is too wet.

Case remitted with a direction to convict.

Solicitor for appellant: *W. M. Graham-Harrison, Solicitor to Customs and Excise.*

Solicitors for respondents: *George Turner & Osborn.*

J. E. A.

ALLEN *v.* COMMISSIONERS OF INLAND REVENUE.

1913
Dec. 8, 13.

Revenue—Undeveloped Land Duty—Person chargeable—Owner for the Time being—Purchaser in Possession before Execution of Conveyance—Right of Appeal—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 19, 33, 41.

By s. 19 of the Finance (1909-10) Act, 1910, "undeveloped land duty shall be assessed" by the Commissioners of Inland Revenue "and shall be recoverable from the owner of the land for the time being." By s. 41 "the expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold."

The appellant, whose business was that of a land developer, bought some land and cut it up into plots, which were purchased by different persons under agreements providing for the payment of the purchase-money by instalments and for the execution of conveyances on the completion of the payments. The Commissioners made an assessment upon the appellant for undeveloped land duty in respect of these plots of land. At the date of the assessment the purchasers were in possession of their respective plots, but not having completed their payments had not received their conveyances. The appellant appealed to a referee against the assessment on the ground that he was not the owner of the plots of land and was, therefore, not liable to pay the duty. The referee by his award declared that the appellant was the owner and was liable. From this decision the appellant appealed to the High Court:—

Held, that a person upon whom an assessment for undeveloped land duty is made is entitled under s. 33 of the Act to appeal against the assessment to a referee, and to appeal from the referee's decision to the High Court, on the question whether he is the owner of the land in respect of which the assessment has been made.

Held, also, that the purchasers and not the appellant were at the date of the assessment the owners of the plots of land within s. 41 of the Act, and that the assessment had, therefore, been wrongly made upon the appellant.

Lysaght v. *Edwards* (1876) 2 Ch. D. 499, followed and applied.

Appeal from a decision of a referee under the Finance (1909–10) Act, 1910.

On March 26, 1912, the Commissioners of Inland Revenue served the appellant, Allen, with notices that by virtue of the power and authority vested in them by the Finance (1909–10) Act, 1910, they had for each of the years ending March 31, 1910, 1911, and 1912, made an assessment on him of 15*s.* 7*d.* for undeveloped land duty in respect of certain plots of land in the county of Bedford. The notices further stated that the duty

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

should be paid to the Accountant-General of Inland Revenue, and that if Allen desired to appeal he should give notice as therein specified. In the book of the Commissioners the name of the appellant, "J. Allen," had been entered as the "owner chargeable" in respect of the land in question.

Allen gave notice of his intention to appeal against the assessment on the ground that he was not the person liable for payment of the duty under the provisions of the Act of 1910.

Before the hearing of the appeal amended particulars were served stating the grounds of appeal to be (inter alia) that the appellant was not the person liable for the payment of the duty under the Act of 1910, and that the land in question was not undeveloped land within the true intent and meaning of s. 16, sub-s. 2, of the Act.

At the hearing of the appeal before the referee the following facts were proved or admitted. The business of the appellant was that of a land developer. His method of business was to buy a suitable piece of land for development, to cut it up into suitable plots and advertise the plots for sale by circulars and advertisements. In the ordinary course of his business the appellant had bought certain land in Bedfordshire and had divided it into plots, certain of which plots were the lands in respect of which the assessments appealed against had been made. These plots had been sold by the appellant to different purchasers on the terms of agreements which provided that a deposit should be paid on signing the agreement, and that the remainder of the purchase-money should be paid by monthly instalments, with interest at 5 per cent. from the date of the agreement and payable annually, until the whole of the purchase-money had been paid, "and upon the whole of the purchase-money being paid with interest as aforesaid, the vendor shall execute a conveyance to the purchaser, free of expense, in the form used by the vendor on the sale of other portions of this estate . . . . If default shall be made by the purchaser in any one of the said monthly payments the vendor shall be at liberty at any time (by notice in writing to the purchaser . . . .) to annul and all payments and interest shall thereupon be forfeited to the vendor."

On the signing of the agreements the purchasers of the plots in question had with the consent of the appellant taken possession of their respective plots, and were still in possession at the dates when the assessments had been made, but as they had not completed the payments of their purchase-money, no conveyances of the plots in question to the respective purchasers had been executed.

The referee by his award found and declared that "the owner of the land for the time being" liable to undeveloped land duty in respect of the plots of land was the appellant.

From this decision the present appeal was brought.

Sir S. O. Buckmaster, S.-G. (*W. Finlay* with him), for the Commissioners. There is a preliminary objection to the hearing of this appeal. By s. 33, sub-s. 1, of the Finance (1909–10) Act, 1910, a right of appeal is given against the determination of the Commissioners in certain specified matters; by sub-s. 2 these appeals are referred to one of the referees appointed under the Act; and by sub-s. 4 "any person aggrieved by the decision of the referee" may appeal to the High Court. The question raised by this appeal, namely, whether the appellant is the owner of the land in question, is not one of the matters specified in sub-s. 1 of s. 33. The question of the ownership of the land only becomes material when proceedings are taken to recover the duty, for by s. 19 the duty is "recoverable from the owner of the land for the time being," and it may very well be the case that even if the appellant is the owner now he may not be so when proceedings are taken, for he may have ceased to be the owner in the interval. The referee had therefore no jurisdiction to decide the question; his decision on this point is a mere nullity, and no appeal to this Court lies therefrom. It is true this point was not taken before the referee, but consent cannot give jurisdiction. The Court is really being asked to decide a question which can only arise in the future and which may never do so. The Courts never entertain questions of that sort.

Hewitt, K.C., and *W. Allen*, for the appellant. The Commissioners have provisionally determined that the appellant is chargeable with the duty and have called upon him to pay it.

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

That comes within the words "the determination of any other matter which the Commissioners are to determine or may determine under this Part of the Act" in sub-s. 1 of s. 33. There was, therefore, a right of appeal to the referee, and the appellant is a "person aggrieved by the decision of the referee" within sub-s. 4.

SCRUTTON J. referred to the particulars of assessments which under s. 30, sub-s. 1, of the Act have to be recorded by the Commissioners, and to r. 4 (2.) of the Land Values (Referees) Rules, 1910, and he stated that he would hear the case before giving his decision on the preliminary objection.

Hewitt, K.C., and *W. Allen*, for the appellant. The first question is, is the appellant the owner of the plots of land in respect of which the assessments have been made? By s. 41 "the expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate in freehold." The appellant does not come within that definition. Until the purchase-money has been paid and the conveyances have been executed the legal estate in fee is in the appellant, but as soon as the contracts were signed the purchasers acquired a fee simple in equity subject to the obligation of paying the purchase-money, and the appellant's interest in the land becomes a mere money interest, which is personalty, whereas the purchaser's interest is realty: *Attorney-General* v. *Brunning* (1); *Shaw* v. *Foster* (2); *Lysaght* v. *Edwards*. (3) In the circumstances of this case, therefore, the purchasers have an estate of freehold in these lands and they are entitled in possession to the rents and profits. If they granted leases, as they might do, they would receive the rents; they are entitled to the crops which may be grown on the land; and in the case of a trespass they would be the proper persons to maintain an action against the trespasser. [They also referred to Dart's Vendors and Purchasers, 7th ed., pp. 287, 667, and Williams' Vendor and Purchaser, 2nd ed., p. 49.]

Secondly, this land is not undeveloped land. The undeveloped

(1) (1860) 8 H. L. C. 243. (2) (1872) L. R. 5 H. L. 321.
(3) 2 Ch. D. 499.

land duty is imposed by s. 16, sub-s. 1, of the Act of 1910, and by sub-s. 2 land shall be deemed to be undeveloped if it has not been developed in the manner specified "or is not otherwise used bona fide for any business, trade, or industry other than agriculture." The appellant's business is that of a land developer and this land is used by him in his business within the meaning of sub-s. 2. It is therefore not liable to be assessed to undeveloped land duty.

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the Commissioners. It is not disputed that the appellant on the signing of the contracts became trustee for the purchasers of these plots of land who would in the circumstances be regarded in equity as the owners of the plots. The real question is whether the word "owner" in s. 41 means the legal owner or the equitable owner. The appellant is the legal owner in possession, the word "possession" in s. 41 being used in contradistinction to reversion and not in the sense of occupation. The appellant being the legal owner in possession is the person entitled to the rents and profits, and he alone could give a receipt for them, though when received he would no doubt hold them as trustee for the purchasers. The reference to rents and profits only means that the owner must be entitled in possession to the full enjoyment of the land. It is doubtful whether a purchaser who had not got a conveyance could sub-let. The ownership contemplated by s. 41 is a legal ownership which changes from time to time by a conveyance, not an ownership which may change owing to a purchaser without a conveyance having been let into possession. If the section can mean either a legal or an equitable owner, it cannot mean both; and from the fact that the section does not say which is meant, it must be inferred that the owner is to be a legal and not an equitable owner. If a phrase in an Act of Parliament is intended to have an equitable meaning it is usual for the Act to say so in terms. For example, s. 57 of the Merchant Shipping Act, 1894, expressly provides that the expression "beneficial interest" in Part I. of that Act includes "interests arising under contract and other equitable interests." Similarly, s. 24, sub-s. 3, of the Settled Land Act, 1882, in terms speaks of "the beneficial interest in

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

land." In the absence of any words in s. 41 indicating that the "owner" is to be the equitable owner the word should be construed as applying only to legal owners. [*In re Wythes* (1) was cited.]

With regard to the second point, a developer of land does not use the land, which he is developing, for the purpose of his business within the meaning of s. 16, sub-s. 2. Land may be used by being cultivated or by being built upon, but a person who buys land to sell it again, as the appellant does, does not use it. Sub-s. 2 (*b*) of s. 16 expressly provides that where expenditure on roads has been incurred on part of land included in a scheme of land development, that land shall for the purposes of s. 16 be treated as developed or used land. If the appellant's contention is well founded, that proviso would not have been required.

Hewitt, K.C., replied.

Cur. adv. vult.

1913. Dec. 13. SCRUTTON J. read the following judgment:—This was an appeal by John Allen against a decision of a referee awarding that he was the "owner" of certain plots of land in respect of which the Commissioners of Inland Revenue had assessed him to undeveloped land duty on a small amount, the exact accuracy of which was not in question on the appeal. Allen contended that he was not the "owner" within the meaning of the Finance (1909-10) Act, 1910, and that the land was not undeveloped land, as it was used in his business of a land developer by being offered for sale.

The facts were shortly as follows: Allen bought land, cut it up into plots and sold it, in many cases, including the cases in question, providing for payment by instalments with interest at 5 per cent., power to the vendor to rescind on failure to pay instalments, and conveyance to the purchaser on completion of the payments. Occupation was in fact given to the purchaser on the making of the contract. In all the cases, at the date of these assessments appealed against the purchaser was in possession, but had not got his conveyance, as he had not completed payment of his instalments.

(1) [1893] 2 Ch. 369.

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

Scrutton J.

The Crown raised the preliminary point that neither the referee nor the High Court could decide whether Allen was a person chargeable with the duty. It was said that s. 19 of the Act of 1910 only required the Commissioners to assess the duty, and then made it recoverable from "the owner of the land for the time being," that is at the time when proceedings were taken to recover it, when the chargeability of the defendant would be decided in the proceedings on the information. It was further said that s. 33 of the Act of 1910 only gave an appeal in respect of "the amount of any assessment of duty" under the Act, or "against the determination of any other matter which the Commissioners are to determine or may determine under this Part of the Act." The Solicitor-General agreed that an appeal lay against the amount of the assessment or in respect of the chargeability of the subject-matter, that is, whether it was undeveloped land or not, but argued that an appeal did not lie in respect of the chargeability of the person assessed, that is, whether he was the owner for the time being of such land.

The facts which may be relevant to this point are that on March 26, 1912, the Commissioners served on "J. Allen, Esquire" a notice "that the Commissioners have made an assessment on you" for undeveloped land duty in respect of certain plots of land; "And further take notice that the aforesaid duty should be paid to the Accountant-General," and "If you intend to appeal to a referee against this assessment you should give notice to the Reference Committee within thirty days from this date on forms which will be supplied to you, on application, by me." Under threat of proceedings Allen obtained with the assent of the Commissioners an extension of time to appeal, and gave notice of appeal against the assessment on the ground "that I am not the person liable for payment of the said duty under the provisions of the Act." The appeal was heard before the referee without any objection by the Commissioners; but the point was first raised before me by the Solicitor-General that no appeal lay to a referee, or from him to the High Court, on the question of assessability as distinguished from amount of assessment.

I hold that this objection fails. Sect. 19 requires the

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

Scrutton J.

Commissioners to assess undeveloped land duty, and s. 30 requires them to record particulars of all assessments and to furnish copies of particulars so recorded to any person interested in the land. They had entered in their book "J. Allen" as "owner chargeable," with a notice that an assessment had been notified to him, and they had in fact served him with a notice of assessment, and notice to pay. He seems to me clearly "a person aggrieved" within s. 33, and it is admitted he can appeal on the point whether the land is undeveloped land. I think the provision that he can appeal against the amount of any assessment allows him to appeal on the question whether he is rightly assessed at all. This is borne out by the language of r. 4 (2.) of the Land Values (Referees) Rules, 1910, which speaks of "an appeal against any assessment of duty."

On the merits of the appeal, Mr. Hewitt for the appellant contended, first, that Mr. Allen was not owner of the land within the definition in s. 41. "The expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold," except where land is let on lease for a term of which more than fifty years are unexpired. That this definition is not one of perfect clearness appears from the fact that on my asking counsel whether a mortgagee out of possession or his mortgagor was "owner" under this definition, the Solicitor-General replied, "The mortgagee," and Mr. Hewitt, "The mortgagor." This point remains for decision in a future case. In the present case Allen had contracted to sell a plot of land for a price payable by instalments with interest, with a power to rescind on non-payment of instalments, and a duty to convey the land when the price was paid, and not before. He had also let the purchaser into possession of the land. His legal position is stated by Jessel M.R. in *Lysaght* v. *Edwards* (1) thus: "What is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you

(1) 2 Ch. D. at p. 505.

have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession." I pause to remark that in this case, though there is nothing in the contract providing for it, in fact the purchasers went into possession, when the contract was made, of this estate. "In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate, and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'Either pay me the purchase-money, or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was in equity a valid contract. Now, what is the meaning

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

Scrutton J.

of the term 'valid contract'? 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his right to rents till

the day for completion, he appears to me to have no other rights."

I have read that passage at considerable length because it is a matter in which it appears to me one of the greatest masters of equity expressed his view of the relationships under this contract, with this difference, that Jessel M.R. is speaking of a vendor who is in possession, and a purchaser who is out of possession; whereas in this case the purchaser is in possession. As between such a vendor and such a purchaser, who is the "owner" under s. 41 of the Act? Such an owner is defined as: (1.) a person entitled to rents and profits; (2.) entitled in possession, which I take to be contrasted with "entitled in reversion" and not to mean "entitled to possession"; (3.) entitled in virtue of any estate of freehold, which I take to be an estate in lands of free tenure as distinguished from copyhold tenure, held for an uncertain period as distinguished from a fixed term of years. This term is probably used here to exclude leasehold interests except the fifty years' term next mentioned. Is the vendor or purchaser entitled to rents and profits? The vendor is entitled to the purchase-money, which is not in my view a rent or profit. This is by hypothesis undeveloped land, and if the purchaser in possession lets it, or grows crops on it, he and not the vendor is entitled to the rents and profits. This is so as between themselves, and the vendor could not, against such third parties, sue for rent. The purchaser, being in possession, could bring trover and trespass for severed crops; if the vendor could sue in trespass it would be as trustee for the purchaser. It follows in my view that the purchaser, who is the beneficial owner, is the owner within the section. This would not always be true. A trustee who alone could sue for rents and profits would not, I think, the less be owner because he had to account to his cestui que trust, and I am expressing no opinion on the incidence of the tax between mortgagor and mortgagee. All I decide here is that on these particular contracts the purchaser who is in possession (though his instalments are not yet paid and he has therefore no conveyance of the legal estate) is beneficial owner in possession, not in reversion, entitled in the Courts to the rents and profits

1913

ALLEN v. INLAND REVENUE COMMISSIONERS.

SCRUTTON J.

of the land by an equitable fee simple or beneficial ownership, defeasible on non-payment, but convertible into a legal fee simple on payment. This appears to me to follow from the words used in s. 41.

It was further argued on behalf of Allen that the land was not undeveloped land because he was trying to develop it, and was therefore using it as his stock in the trade of a developer. I was not impressed by this argument, which seems to me quite inconsistent with proviso (*b*) to sub-s. 2 of s. 16, but as I decide in his favour on another ground, it is not necessary to determine it finally.

I therefore reverse the decision of the referee and decide that J. Allen, not being "owner," within the definition in s. 41, of the plots, the subject-matter of the appeal, at the time of the assessment, was not liable at that time to pay undeveloped land duty in respect of those plots. He must have the costs of the proceedings.

Hewitt, K.C. That will include the costs of the proceedings before the referee.

SCRUTTON J. Yes.

Appeal allowed. Leave to appeal.

Solicitor for appellant: *W. H. Brown.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

F. O. R.

INLAND REVENUE COMMISSIONERS *v.* CLAY AND OTHERS.

1913
Dec. 8, 9, 10, 13.

INLAND REVENUE COMMISSIONERS *v.* BUCHANAN AND OTHERS.

Revenue—Increment Value Duty—Sale of Fee Simple—Gross Value—Sale in "Open Market" by willing Seller—Special Adaptability to Needs of particular Purchaser—Appeal from Referee—Oral Evidence on Appeal—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

Sect. 25, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

The fee simple of a house to persons desirous of using it as a private residence was worth not more than 750*l.* The house, however, adjoined a nursing home the trustees of which desired to extend their premises, and it was advantageous to them to pay at least 1000*l.* for the house in question, and they in fact actually purchased it for that sum :—

Held, that the referee was right in fixing 1000*l.* as the gross value of the house for the purposes of the above sub-section.

The fact that on the hearing of the appeal from the referee the Court heard oral evidence is not to be taken as binding the Court to such a course in future.

Appeals by the Inland Revenue Commissioners from decisions of a referee under the Finance (1909-10) Act, 1910.

The appeals to the referee by Clay and others and by Buchanan and others were heard together, both having reference to the same dwelling-house and garden, No. 83, Durnford Street, East Stonehouse, Plymouth, the fee simple of which was bought by Clay and others on September 29, 1910, from Mrs. Buchanan for 1000*l.*

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

On January 24, 1911, a provisional valuation of the house was made which shewed the following items:—Original gross value, 750*l.*; original total value, 750*l.*; difference between the gross value and the value of the fee simple divested of buildings, trees, &c., 560*l.*; original full site value, 190*l.*; and original assessable site value, 190*l.*

The conveyance of the house by Mrs. Buchanan to Clay and others being an "occasion" under and by virtue of s. 2, sub-s. 2, of the Finance (1909-10) Act, 1910, particulars as provisionally determined of the values on the occasion were, on February 21, 1911, duly made and served by the Commissioners' valuer. Those particulars shewed as follows:—Value of land on the occasion, 1000*l.*; difference between gross value and value of the fee simple divested of buildings, trees, &c., 560*l.*; site value on the "occasion," 440*l.*

Notices of appeal were duly given against the total site value fixed in the provisional valuation, and against the provisional determination of the site value on the "occasion."

At the hearing of the appeals by the referee evidence was called on both sides. The evidence called by the Commissioners shewed that the gross value of the land on the occasion did not exceed 750*l.*; the evidence called on the other side did not dispute that, apart from one special circumstance, the gross value was fairly fixed at 750*l.* The special circumstance was that the purchase by Clay and others from Mrs. Buchanan was a purchase by them as trustees on behalf of a nursing home; they occupied the house next door to the house in question, and, being desirous of extending their premises, they were prepared to give and did give 1000*l.* for the house now in question. It was contended that that circumstance constituted a special adaptability of the house in question, enhancing its value and rendering 1000*l.* a proper value to be fixed.

The referee in the appeal against the provisional valuation (Clay's case) gave his decision as follows:—"The decision on the appeal in respect of which the annexed notice of appeal has been given, is that items numbered 1, 2, and 12 in the provisional valuation are insufficient, and that the amounts of these should be as follows:—

1. Gross value - - - - -		£1000
Deductions from gross value		
2. Difference between gross value and value of fee simple of land divested of buildings, trees, &c. - - -	£800	
Full site value -	£200	£1000
Deductions from total value		
12. Deductions from gross value to arrive at full site value (as above) - -		£800
Assessable site value -		£200"

In the other appeal (Buchanan's case) the referee's decision was as follows:—

"The decision of the appeal in respect of which the annexed notice of appeal has been given is that the site value on the occasion of the sale to and purchase by the appellants is not correct, and that the amount should be as follows:

Value of land on the occasion - - -	£1000
Deductions to arrive at site value on the occasion.	
Difference between gross value and value of fee simple of the land divested of buildings, trees, &c. - - - - - - - -	£800
Site value on the occasion -	£200"

The Commissioners appealed in both cases, contending that the evidence shewed that the fee simple, sold in the open market by a willing seller, would not have fetched more than 750*l.*, and that the price that one particular purchaser might, owing to special circumstances, be prepared to give was not the measure of the market value of the house.

At the hearing of the appeals oral evidence was given as to the value of the house in question, the effect of which is fully stated in the judgment; substantially it was to the same effect as that given before the referee.

Danckwerts, K.C., and *W. Allen*, for the respondents. There is a preliminary objection to the appeal in Buchanan's case. In

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

that case the Commissioners of Inland Revenue have not assessed the increment value duty; they have merely as incidental to the calculation of the duty provisionally determined the site value on the occasion. No appeal lies from such a determination, and the referee can only have dealt with it as an arbitrator. [They referred to *Burgess* v. *Morton*. (1)]

Sir S. O. Buckmaster, *S.-G.*, and *W. Finlay*, for the appellants. What happened was this: a notice was sent to the respondents in which the valuation of the site value was specified. The respondents thereupon desired to appeal against this assessment to duty, but it was pointed out to them that an appeal could not then lie as there had been no assessment to duty. It was made clear, however, that the site value on the occasion had been determined, and the Commissioners intimated that they would not object to an appeal from that determination. Such an appeal lies under the later words of s. 33 of the Finance (1909-10) Act, 1910.

Danckwerts, *K.C.*, in reply. As an express appeal is given against an assessment to duty, the concluding words of s. 33 have no application in this case.

SCRUTTON J. said he would reserve his decision upon this point and would deal with it in his judgment on the merits.

Sir S. O. Buckmaster, *S.-G.* The question is what is the gross value of this house within the meaning of s. 25 of the Finance (1909-10) Act, 1910. (2) In *Lumsden* v. *Inland Revenue Commissioners* (3) it was decided that the calculations specified in the various sub-sections of s. 25 must be gone through and that the gross value of a property cannot, for the purposes of the section, be ascertained by finding the amount for which it was sold. The Commissioners say, and this is supported by the evidence, that the gross value of this property, for the

(1) [1896] A. C. 136.

(2) Sect. 25, sub-s. 1, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8): "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

(3) [1913] 3 K. B. 809.

purposes of the section, was no more than 750*l.*, and not 1000*l.*, the amount for which it was sold. The price which the property may be worth to the purchasers for their own purposes is not the true measure of its market value. In *In re Lucas and Chesterfield Gas and Water Board* (1), a case dealing with the compulsory acquisition of land, Fletcher Moulton L.J. said: "The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. . . . . But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers." The principle there enunciated is applicable to this case: the special value which this property has to the purchaser cannot be taken as "the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, ... might be expected to realise." The referee was therefore wrong in taking into account the value to the particular purchasers.

Danckwerts, K.C. Although the *Lumsden Case* (2) is a binding authority in this Court, it is submitted that it was wrongly decided.

There is no market for land and house property such as there is for stocks and shares; the word "market" in s. 25 cannot therefore be used in a technical sense. The market value of property depends upon the higgling of the two parties interested, namely, the vendors and the purchasers. Why should not the particular purchasers in this case be taken as possible purchasers? There is no better criterion for arriving at the market value of the property than by considering what the principal buyer is willing to give. That was the view taken by the referee, and his finding should not be interfered with unless a blunder can be shewn to have been committed by him; and no blunder has in fact been committed by him. A consideration of the various authorities bears out the respondents' contention. In *Reg.* v. *Brown* (3) Cockburn C.J. said this: "A jury, whether the

(1) [1909] 1 K. B. 16, at p. 29
(2) [1913] 3 K. B. 809.
(3) (1867) L. R. 2 Q. B. 630, at p. 631.

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

dispute be as to the value of land required to be taken by the company, or as to the compensation for damages by severance, in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. That is the mode in which the land would be valued." In *Ripley* v. *Great Northern Ry. Co.* (1) prospective profits were held to have been properly taken into account in awarding compensation to a person whose land was compulsorily taken. In *In re Countess Ossalinsky and Manchester Corporation* (2) and in *In re Gough and Aspatria, Silloth and District Joint Water Board* (3) the special adaptability of land for a particular purpose was held to be a proper matter for consideration as an element of value. The principle of those cases applies here, and there is nothing conflicting with it in Fletcher Moulton L.J.'s judgment in *In re Lucas and Chesterfield Gas and Water Board.* (4)

[He was stopped.]

Sir S. O. Buckmaster, S.-G., in reply. It was clearly decided in the *Lumsden Case* (5) that the price at which a property is sold is not for this purpose the measure of its gross value. The price paid may be an element to be considered, but it is not the determining factor. In this case there was no higgling of the market, there being no possible purchaser beyond the trustees of the nursing home. The vendor was charging not the market price, but a fancy price; that price was not what the property would have realized in the open market.

[SCRUTTON J. What do you mean by the open market?]

Where any one may come and buy. Here there is no evidence that any one except the trustees of the nursing home would have given more than 750*l.* It is not the anxious purchaser that for this purpose has to be regarded, but the willing seller. A

(1) (1875) L. R. 10 Ch. 435.
(2) (1883) Browne and Allan's Law of Compensation (2nd ed.). p. 659.
(3) [1904] 1 K. B. 417.
(4) [1909] 1 K. B. 16, at p. 29.
(5) [1913] 3 K. B. 809.

willing seller is a person who is not prepared to hold up the property until a special price may be obtained.

The authorities cited on behalf of the respondents have no relevancy to this case. In *Reg.* v. *Brown* (1) compensation was awarded on account of the prospective value of the land for building purposes, but any one could have undertaken to carry into effect building operations. *In re Gough and Aspatria, Silloth and District Joint Water Board* (2) and *In re Countess Ossalinsky and Manchester Corporation* (3) only decided that, where land from its very nature is specially capable of being adapted for the collection and holding of water, the fact that persons desirous of obtaining a water supply would naturally want that land could be taken into consideration in determining the compensation to be awarded. But this house has no special adaptability to the public generally for a nursing home; its only value as a nursing home is due to the needs of the nursing home next door. In *In re Lucas and Chesterfield Gas and Water Board* (4) Fletcher Moulton L.J. said that "where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it"; and at the very end of his judgment he said (5): "No element of that which economists term 'value in use' can, in my opinion, increase compensation, unless it is either a 'value in use' to the seller or a 'value in use' to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price." That judgment is strongly in favour of the Commissioners' contention.

Cur. adv. vult.

Dec. 13. SCRUTTON J. read the following judgment:— The Commissioners of Inland Revenue appeal against two decisions of a referee in respect of No. 83, Durnford Street,

(1) L. R. 2 Q. B. 630.
(2) [1904] 1 K. B. 417.
(3) Browne and Allan's Law of Compensation (2nd ed.), p. 659.
(4) [1909] 1 K. B. 16, at p. 31.
(5) Ibid. at p. 35.

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

Scrutton J.

Stonehouse. In the first (Clay's case), on January 24, 1911, a provisional valuation was made of the land in question as on April 30, 1909, giving original gross value 750*l.*, assessable site value 190*l.* Clay and others appealed, and the referee has altered these figures to 1000*l.* and 200*l.* respectively.

In the second (Buchanan's case), the Commissioners on February 21, 1911, provisionally determined the site value on the occasion of a sale of the premises by Mrs. Buchanan to Clay and others, trustees of a nursing home adjoining, for 1000*l.* on September 29, 1910. Deducting 560*l.* (750*l.* minus 190*l.*) as above, they obtained 440*l.* as assessable site value. The next step would have been an assessment of increment duty on the difference between 440*l.* and 190*l.*, with proper deductions, following *Lumsden's Case* (1), when Mrs. Buchanan appealed to the referee, who deducted from 1000*l.*, the consideration, 800*l.* (1000*l.* less 200*l.*) instead of 560*l.* as above, leaving practically the same assessable site duty as before, and no increment duty payable. The Commissioners appealed against both decisions of the referee.

In Buchanan's case counsel for the subject took the preliminary objection that no appeal lay, as increment value duty had not yet been formally assessed: the determination of assessable site value by the Commissioners was merely incidental, and though they had consented to an appeal to the referee on this point, as no appeal lay of right, the referee was merely acting as an arbitrator by consent, and there was no appeal from his finding. What exactly had happened was this: On February 21, 1911, the Commissioners had sent provisional particulars of site value with a request for any objections. On April 5 the subject's solicitor objected and asked for a deduction of 800*l.* On September 14, 1911, the subject's valuer asked for a formal decision so that the subject might appeal to the referee. On September 29 the Commissioners wrote that the normal method would be to appeal against the assessment of increment value duty, but that so that the two appeals might come on together they would not raise objection to an appeal against the site value on the occasion, "which they have determined as already notified to her at 440*l.*"

(1) [1913] 3 K. B. 809.

They had not in fact notified their final determination, but this letter was treated as a determination by both parties. On a notice of appeal against assessment of increment duty being given, the Commissioners pointed out on November 2, 1911, that it should be against the determination of the Commissioners of the site value on the occasion of the sale. Such a notice was then given, and the matter came before the referee in the ordinary way. If he had decided against the subject, I think I should have heard bitter complaints from the subject if it had been suggested there was no appeal. But it seems to me clear that the Commissioners' determination was either a "subsequent determination . . . . of the . . . . site value of any land," or "the determination of any other matter which the Commissioners are to determine . . . . under this part of this Act" under s. 33, for the Commissioners had, before they assessed increment duty, to determine the site value on the occasion in accordance with s. 2; and the appeal was against that determination. The objection seems without merits, and fails.

On the merits, I listened for nearly a day to the evidence of valuers and others. There is nothing in the Act expressly treating an appeal as a rehearing, or requiring the judge to whom the appeal comes to hear the evidence all over again. Sect. 33, sub-s. 4, gives an appeal to the High Court "in the manner" directed by Rules of Court, and r. 7 provides that "unless by consent or otherwise ordered, only oral evidence shall be admitted at the hearing." It is said that this rule requires me to rehear every appeal on oral evidence, and I am told that the last two Revenue judges did hear one or two cases in this way. In my view this matter may require very serious consideration, if appeals on facts are as numerous as I am led to expect, and my hearing oral evidence in this case must not be taken as binding me, or other Revenue judges, to such a course in future.

After listening to the evidence I find the following facts: (1.) No. 83, Durnford Street was an old well-built house, needing some expenditure on the roof, but otherwise in good repair, and could not be rebuilt for less than 1200*l*. (2.) In view of the declining prosperity of the neighbourhood and the nature of the accommodation in the house, to people who wanted to use No. 83

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

Scrutton J.

as a private residence, having regard to the other houses offering, No. 83 was not worth more than 750*l.*, which was the utmost such people could be expected to give. The owner had bought it in 1902 for 700*l.* (3.) To the nursing home, which owned the neighbouring house and needed further accommodation near, No. 83 was so adjacent and offered such suitable accommodation that it would be advantageous to them to pay at least 1000*l.*, probably more, for it; and the 1000*l.* actually paid was a profitable business transaction to the nursing home and not a fancy price. It was not worth any one else's while to pay a sum substantially larger than 750*l.*, except in the hope of reselling to the nursing home, to which the house was obviously of considerable value and a likely subject of purchase.

These findings raise the important question of principle in dispute between the parties. The Crown contends that in estimating the gross value of land under s. 25, sub-s. 1, of the Act I must exclude the price which one particular buyer will give because of his particular need; that this is not the price in "the open market"; and that the willing seller must be willing to sell at a market price, not a fancy price. The Solicitor-General relied on the course of authorities summarized by Fletcher Moulton L.J. in his judgment in *In re Lucas and Chesterfield Gas and Water Board* (1), that in assessing compensation under the Lands Clauses Act for compulsory purchase you cannot consider the special need of the compulsory purchaser; the existence of the scheme cannot enhance the value of the lands to be purchased under it. This is true, but it is also true that if there are other possible purchasers besides the compulsory purchaser, even in such a case the competition of special needs may be taken into account in fixing the compensation to the vendor. I do not, however, think the decisions on compensation for compulsory purchase help me on this Act. Under the Lands Clauses Act, speaking generally, the owner who loses his land or sustains damage is to have the value to him, not merely the market value, or the value to the promoters. Under this Act one is to estimate the price which the fee simple would realize "sold in the open market by a willing seller." The seller is not to be assumed to be making a

(1) [1909] 1 K. B. 16.

forced sale at any price he can get, however low. He must be willing to sell, not demanding compensation for a forced sale, but he is not required to exclude the principal bidder from his market, because that principal bidder wants the house more than any one else and will therefore give more for it. The Solicitor-General admitted that if No. 82 was taken by a nursing home, the competition between the owners of No. 82 and No. 84 for No. 83 might be taken into account; but he said that the offers of the owner of No. 84 alone, though based on real necessity, and advantageous to him as the owner of No. 84, must be excluded from the "open market" to be considered. I am unable to follow this reasoning. If the owner of No. 83 had said to an expert, "I wish to sell, but am not forced to, and can wait and negotiate; my house is worth 750*l.* to private owners to live in, but my next neighbour desires to extend his premises, and my house is so convenient and well built that it will pay him to go up to 1200*l.* rather than build elsewhere; what do you think I can realize by a sale?" I think such an expert would have answered, "Well, it depends on diplomacy in bargaining, but I should think you could be sure of selling for at least 1000*l.*, and if you refuse to sell except at your price you can very likely get more." I exclude the last hypothesis of refusal, as I do not think the vendor would then be a "willing seller at the time," but I see nothing in the Act to require me to exclude the first hypothesis, which seems to me the obvious business way to look at the transaction. In other words I cannot exclude from the "open market" the principal buyer, though for a genuine business reason he will pay a price higher than others.

The Solicitor-General also contended that the view of the Master of the Rolls in *Lumsden's Case* (1), "The actual price paid may be either greater or less than would have been reasonably expected," prevented the referee from taking into account the actual price. In *Lumsden's Case* (2) the gross value on the occasion was found by the referee without appeal to be less than the price on occasion, and obviously, when a particular price might be expected, a good sale above it or a bad sale below it may be made without impugning the reasonable expectation of that price.

(1) [1913] 3 K. B. at p. 818. (2) [1913] 3 K. B. 809.

1913

INLAND REVENUE COMMISSIONERS v. CLAY.

INLAND REVENUE COMMISSIONERS v. BUCHANAN.

Scrutton J.

But in my view here any one knowing the facts beforehand would anticipate that 1000*l.* might be obtained, if the owner was willing to sell, from the nursing home, who wanted the house for a particular purpose, though not from other people who wanted it for a different purpose. In my view, therefore, the referee was right in fixing 1000*l.* as the gross value of 83, Durnford Street both in April, 1909, when the nursing home having offered Mrs. Buchanan 850*l.* and having been refused were enlarging No. 84, and in September, 1910, when they bought No. 83 for 1000*l.* He was right in this, not because of the sale for 1000*l.*, but because of the reasonable expectation that a willing seller could get 1000*l.* or more from the nursing home. Referees in assessing gross value on the occasion of sales are not bound by the actual consideration figure, which may be a misunderstanding of market value without business foundation, but where they find a sale influenced by the business wants of the buyer and a profitable transaction to him I think they are justified in considering it, though no other buyer would give such a price except to resell to the one special client.

I am doubtful whether the referee has not fixed each assessable site value too low, as I think that the bare site had a higher value to the nursing home, owing to its contiguity and suitability to their enterprise, than it would have to other buyers; and I should not have been surprised if the referee had fixed 250*l.* as assessable site value on each occasion; but I do not propose to interfere with his figure of 200*l.*

The appeals must be dismissed with costs.

Appeals dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Lewin, Gregory & Anderson, for S. J. Lawry, Plymouth.*

J. S. H.

ATTORNEY-GENERAL *v.* THYNNE.

1913
Dec. 8, 9.

Revenue—Estate Duty—Property passing on Death—Settled Property—Person entitled in Reversion—Presumed Date of Death—Aggregation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 5, *sub-s.* 3—*Finance Act*, 1900 (63 & 64 *Vict. c.* 7), *s.* 12, *sub-s.* 2.

Under s. 1 of the Finance Act, 1894, estate duty is payable in the case of every person dying after the commencement of Part I. of that Act, i.e., August 1, 1894, upon all property which passes on the death of such person; but by s. 5, sub-s. 3, in the case of settled property, where the interest of any person under a settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

Sect. 12, sub-s. 2, of the Finance Act, 1900, provides that "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

By a marriage settlement made in 1864 a sum of money to which the wife was entitled in reversion subject to the successive life interests of her mother and father was assigned to trustees in trust to pay the income to the husband and wife for their lives and after the death of the survivor to stand possessed of the trust fund for such children of the marriage as the husband and wife or the survivor should appoint.

The wife died in 1876. Her mother and father died respectively in 1884 and 1888. The husband died in 1910, and on his death the Crown claimed that for the purpose of ascertaining the rate of the estate duty which then became payable the trust fund ought to be aggregated with other property passing on the husband's death in respect of which estate duty then became payable:—

Held, that if the wife had died after the commencement of Part I. of the Act of 1894 estate duty would then have been payable in respect of the trust fund, because, the deaths of the mother and the father having occurred before that date, the trust fund would have become

1913

ATTORNEY-GENERAL v. THYNNE.

an interest in possession before the wife's death, and that, therefore, by reason of s. 12, sub-s. 2, of the Finance Act, 1900, the claim of the Crown failed.

INFORMATION by the Attorney-General.

By an indenture of settlement dated June 29, 1864, to which Edith Thynne, being then and therein described as Edith Sheridan, spinster, was a party, being a settlement made previously to and in consideration of a marriage which had been agreed upon and which was shortly afterwards solemnized between Francis John Thynne and Edith Thynne, the said Edith Thynne assigned to trustees the sum of 10,000*l.* to which she was absolutely entitled, subject to the successive life interests of her parents Marcia Sheridan and Richard Brinsley Sheridan, upon trust to pay to Edith Thynne out of the income of the said sum during the joint lives of Francis John Thynne and Edith Thynne the yearly sum of 200*l.*, to be raised to 300*l.* when Francis John Thynne should become entitled to certain hereditaments in Bedfordshire, and subject to the payment of the said annual sums of 200*l.* or 300*l.* as the case might be to pay the income of the trust moneys to Francis John Thynne and his assigns and from and after the death of either of Francis John Thynne or Edith Thynne to pay the whole annual income to the survivor during his or her life and after the decease of the survivor to stand possessed of the trust moneys upon trust for the children of the marriage as Francis John Thynne and Edith Thynne should jointly appoint and in default of joint appointment as the survivor of them should by deed or will appoint.

Edith Thynne died on April 9, 1876. Marcia Sheridan died on August 14, 1884. Richard Brinsley Sheridan died on May 2, 1888, and on his death the reversionary sum of 10,000*l.* which was settled by the indenture of settlement of June 29, 1864, fell into possession, and the residue, amounting to 9900*l.*, which remained after the payment of legacy duty thereon was duly paid to the trustees of the settlement.

Francis John Thynne died on January 30, 1910, having by his will appointed the trust funds to be held in trust for certain of the children of the marriage.

1913

ATTORNEY-GENERAL v. THYNNE.

The defendant was the sole surviving trustee of the indenture of settlement.

The informant charged that on the death of Francis John Thynne estate duty under the provisions of the Finance Act, 1894, and the Acts amending or extending the same, became payable upon the principal value of the trust funds representing the residue of the said sum of 10,000*l.* which was settled by the indenture of June 29, 1864, and that for the purpose of ascertaining the rate of the estate duty payable on the said trust funds and on the other property passing on the death of Francis John Thynne in respect of which estate duty then became leviable and which was not under the provisions of the said Acts exempted from aggregation, the said trust funds ought to be aggregated with such other property. If the trust funds were so aggregated as aforesaid the rate of the estate duty was 9 per cent. The defendant as the person accountable did not dispute that on the death of Francis John Thynne estate duty became payable upon the principal value of the said trust funds, but he contended that under the provisions of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the trust funds constituted property which ought for the purposes of estate duty to be treated as an estate by itself, and accordingly that the rate of the estate duty thereon was 4 per cent. and no more. The defendant had paid to the Commissioners so much of the duty as was equal to 4 per cent. on such principal value and he had refused to pay the balance of the duty.

The informant on behalf of His Majesty prayed that it might be declared that for the purpose of ascertaining the rate of the estate duty which became payable on the death of Francis John Thynne the said trust funds ought to be aggregated with the other property passing on the said death in respect of which estate duty then became payable.

Sir S. O. Buckmaster, *S.-G.*, and *Sheldon*, for the Crown. The question is as to the meaning and effect of the words "if the disponer had died after the commencement of" Part I. of the Finance Act, 1894, that is, August 1, 1894. The hypothesis is that the disponer, in this case Edith Thynne, died after that date,

1913

ATTORNEY-GENERAL v. THYNNE.

and the contention on the part of the Crown is that her death must be supposed to have taken place after that date in the actual circumstances in which it did in fact take place, that is to say, in the lifetime of Marcia Sheridan and Richard Brinsley Sheridan. Put in another way the question to be considered is, would no duty have been payable if the Act of 1894 had been in operation at the date of Edith Thynne's death. The answer is that no duty would have been then payable, because the trust moneys were then still in reversion: Finance Act, 1894, s. 5, sub-s. 3. There is therefore a right to aggregate the trust moneys with the other estate of Francis John Thynne, and estate duty is payable at the rate of 9 per cent. The point has been decided adversely to the contention of the Crown by the Irish Court in *Edgeworth* v. *Commissioners of Inland Revenue*. (1)

Clauson, K.C., and *Ashworth James*, for the defendant. The contention of the Crown involves reading into s. 12, sub-s. 2, words which are not there. The only hypothesis is as to the date of the death of the disponer; all the other facts remain as they were. There is nothing in the section to warrant the postponement to a date subsequent to August 1, 1894, of the deaths of other persons who had an interest in the trust property prior to that of the disponer. Nor is there any ground for reading the section as if it said that the Act of 1894 shall be deemed to have been in force at the real date of the death of the disponer. Reading the section in its natural sense and without adding any words, the result is that at the date when Edith Thynne is to be presumed to have died the trust moneys would have been in her possession and would have passed on her death so that estate duty would have been then payable. In these circumstances there can be no aggregation of the trust money with the estate passing on the death of Francis John Thynne.

Sir S. O. Buckmaster, S.-G., replied.

Cur. adv. vult.

Dec. 9. SCRUTTON J. read the following judgment:—This is an information presented against Alfred Walter Thynne by the

(1) [1912] 2 I. R. 606.

1913

ATTORNEY-GENERAL v. THYNNE

Scrutton J.

Attorney-General claiming that estate duty on 10,000*l.* passing on the death of Francis John Thynne in 1910 should be paid at the rate of 9 per cent. and not at the rate of 4 per cent. as offered by the defendant.

The relevant facts are very short. Edith Sheridan was in 1864 marrying Francis John Thynne, and executed a settlement by which she settled a sum of 10,000*l.*, to which she was entitled in reversion on the life interests of Marcia Sheridan and R. B. Sheridan respectively, on trustees to pay thereout during the joint lives of herself and her husband 200*l.* to herself, to be raised to 300*l.* when her husband received certain Bedfordshire rents, and after the death of herself or her husband to pay the income to the survivor, and on the death of the survivor to hold the trust funds upon trust for their children as they jointly, or, in default of joint appointment, the survivor of them, should by deed or will appoint. Edith Thynne died in 1876; Marcia Sheridan in 1884; R. B. Sheridan in 1888; Francis John Thynne in 1910, and the latter by his will appointed the trust funds to certain children.

Estate duty under the Act of 1894 is paid on property passing on a death, but by s. 5, sub-s. 3, of that Act in the case of settled property, where the interest of any person fails by reason of his death, before it becomes an interest in possession, the property shall not be deemed to pass on his death.

The question in this case turns on s. 12, sub-s. 2, of the Finance Act of 1900, which is as follows: "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

1913

ATTORNEY-GENERAL v. THYNNE.

Scrutton J.

Translating this into the concrete facts of this case, it reads "Where settled property, 10,000*l.*, passes on the death of Francis John Thynne after the passing of this Act, namely in 1910, under a disposition made by Edith Sheridan, afterwards Thynne, who died in 1876, being a time before the commencement of Part I. of the Finance Act, 1894, which was in 1894, and such property would, if Edith Thynne had died after the commencement of the said part (namely after 1894), have been liable to estate duty upon her death, the aggregation of the 10,000*l.* with other property passing on the death of Francis John Thynne shall not raise the rate of duty on the 10,000*l.* above 4 per cent." (See Finance Act, 1907, s. 16.)

On this Mr. Clauson for the defendant contends that if Edith Thynne had died in 1894, instead of 1876, the 10,000*l.* would have been in her possession, as Marcia and R. B. Sheridan would have predeceased her. It would therefore have passed on her death and therefore cannot be aggregated with Francis John Thynne's property on his death in 1910 to increase the rate of estate duty payable. This is what the words of the statute appear to say.

The Solicitor-General, for the Crown, argued that the statute should be read "if Edith Thynne had died after 1894, the commencement of this part of this Act, under the actual circumstances under which her death did take place"; that as she did in fact predecease Marcia and R. B. Sheridan, she died not in possession of the 10,000*l.*, but while it was still a reversionary interest; that the property did not therefore pass on her death and the passing cannot be used to prevent aggregation with the other property of Francis John Thynne, in which case 9 per cent. is the rate of estate duty on the aggregated property.

This requires me to postpone not only Edith Thynne's death but also two other deaths, those of Marcia and R. B. Sheridan, or to antedate the actual commencement of this part of the Act to precede the actual death of Edith Thynne, and the statute gives me no directions to perform these efforts of imagination or act on these hypotheses. The smallest alteration of words required is to read the section "such property would, if, when the disponer died, the operation of the said part of the Act is

assumed to have commenced, have been liable to estate duty." It is perhaps sufficient to say this is not what the Act says, and I can see no justification for implying it. I hold therefore that the contention of the Crown is erroneous; and that the sum in question should not be aggregated with other property of Francis John Thynne for the purposes of estate duty so as to increase the rate of estate duty above 4 per cent.

While I have arrived at this conclusion independently, and expressed it in my own way, I am glad to know that the same result was arrived at by the Irish judges in the case of *Edgeworth* v. *Commissioners of Inland Revenue*. (1)

Judgment for defendant.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Farrer & Co.*

F. O. R.

USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE.

1913
Dec. 4, 12.

Revenue—Income Tax—Schedule D—Balance of Profits and Gains—Deductions—Brewery Business—Tied Houses—Repairs—Insurance Premiums—Loss on Rents—Legal Expenses—Income Tax Act, 1842 (5 & 6 *Vict.* c. 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict.* c. 34), *s.* 2.

The appellants carried on the trade of brewers, and solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof were the owners of licensed houses which they let to "tied" tenants, who, in consideration of the "tie," paid a rent less than the full annual value. These premises were not acquired or held as investments. By the tenancy agreements the tenants were bound to repair and to pay rates and taxes, but the appellants in fact did the repairs and paid the rates and taxes as a matter of commercial expediency and in order to avoid the loss of tenants. The appellants also, in respect of these houses, paid premiums on insurances against fire and loss of licences, and incurred legal expenses in connection with the renewal of the licences and other matters which did not relate to any extension of the business.

The appellants claimed that, in estimating the balance of the profits and gains of their business for the purpose of income tax, deductions ought to be allowed in respect of all the above expenses:—

Held, (1.) that the claim to deduct the cost of repairs to tied houses was governed by the decision in *Brickwood & Co.* v. *Reynolds* [1898]

(1) [1912] 2 I. R. 606.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

1 Q. B. 95, and that the deduction could not be allowed; (2.) that the deductions must be allowed in respect of all the other items as expenses necessarily incurred for the purpose of earning the profits and wholly and exclusively for the purposes of the trade.

CASE stated by Commissioners for General Purposes of the Income Tax Acts.

A supplemental statement of facts agreed between the parties, was, by order of Horridge J., taken to be part of the case. The case and agreed statement of facts were as follows.

Usher's Wiltshire Brewery, Limited, carrying on business as brewers and maltsters and sellers of beer, wine, and spirits, appealed to Commissioners for General Purposes of the Income Tax Acts against an assessment of 17,383*l.* (less 401*l.* allowance for wear and tear of plant) made on them under the Income Tax Act, 1854 Sched. D, in respect of the profits of their trade. The appellants claimed to have this assessment reduced by the following amounts :—

	£	*s.*	*d.*
(*a*) Repairs to tied houses . . .	1004	0	10
(*b*) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand . . .	2134	14	6
(*c*) Fire and licence insurance premiums	90	7	6
(*d*) Rates and taxes	38	7	6
(*f*) Legal and other costs . . .	56	0	0

By the tenancy agreement, which was used in the case of all the tied houses in question, the tenant agreed to buy all liquors from the landlords and not to buy any liquors from any one else, to use the premises as a public-house only, to pay all rates and taxes, and to repair and keep in good tenantable condition the interior of the premises. In respect of the houses in question the appellants have in fact borne the cost of the repairs themselves. They have done so because, although the legal obligation to repair is on the tenant, it is found that it is in the interests of the appellants commercially to pay for these repairs rather than to enforce the legal obligation resting on the tenants. The

cost is incurred not as a matter of charity but of commercial expediency, and is necessary in order to avoid the loss of tenants and consequent transfers, to which the licensing justices object. Some of these repairs are to the exterior of the premises.

In consideration of the "tie" contained in the tenancy agreement, the appellants let the tied houses at considerably less than their annual value or what they could get for them without such a tie, and in the case of houses rented by them also below what they pay for the rent thereof themselves. Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords, and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the appellants on the one hand and, (i.) in the case of their freehold houses, the net Sched. A assessments; (ii.) in the case of their leasehold houses, the rents paid by them.

The insurance premiums are annual expenses incurred by the appellants on the tied houses, in the one case to insure against destruction of or injury to the premises, i.e., the fabric, by fire, in the other to insure against loss of the publican's or beer-house licence (as the case may be) in cases where no compensation is payable out of the compensation fund. The payment of premiums for the insurance of trade premises is a usual and proper trade outgoing and is made by the appellants as such.

The rates and taxes were paid by the appellants in respect of some of the tied houses. In respect of the houses for which this claim arises the appellants did not, for the reasons above stated with regard to repairs, enforce the tenants' covenants to pay and consequently paid the rates and taxes themselves.

The legal costs and expenses were solicitors' costs and disbursements paid by the appellants in respect of the said tied houses, incurred in respect of the renewal of publican's licences, surrenders, terminations and assignments of leases or tenancy agreements, the assessments of tied houses, obtaining a full licence, complaints against tenants, and advising as to thefts of

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

beer. These expenses were not incurred for any extension of the business, so as to be in the nature of capital expenditure.

In common with other brewery companies the appellants have from time to time, in order to increase their trade, purchased licensed houses which they let to tenants, one of the terms of such lettings being that the tenants should buy from the appellants all the ale, beer, wines and spirits sold in such tied houses.

The profits of the appellants are made by brewing ale, beer, and other articles and purchasing spirits in bulk and selling these commodities partly to private individuals, partly (to a limited degree) to free licensed houses, and as to the greater part to the tenants of their tied houses. All these profits of the appellants are included in the assessment. Such profits are materially increased owing to the possession by them of the tied houses in question and in consequence of an increased sale of these commodities to the tenants of those tied houses and to the fact that they are able to obtain and do obtain for the same class of goods a higher price from the tenants of their tied houses than they can obtain or are able to obtain from their other customers.

The tenants of the appellants' tied houses do not, as a matter of fact, spend any money on repairs to the tied houses let to them. Such repairs as from time to time become necessary to these tied houses are executed by the appellants, and it is not disputed that the sum of 1004*l.* 0*s.* 10*d.* is not an excessive sum to be expended in such repairs, including compliance with the requirements of the licensing authorities.

The tied houses in question are occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. Repairs are executed indifferently to the trade and private dwelling parts of these houses.

The said premises have been acquired by the appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business. The possession and employment of the said premises as aforesaid are necessary

to enable them to earn the profits upon which they pay income tax, and without the said premises and their uses as aforesaid the appellants' profits, if there were any at all, would be less in amount. Except for the purposes of and employment in their said business the appellants would not possess the said premises. The said premises were not acquired and are not held by the appellants as investments, and if any house loses its licence the appellants as soon as possible get rid of it. The repairs to the said premises (in respect of which a deduction was claimed by the appellants) were solely repairs which the appellants were bound to do in order to maintain the said premises in a condition fit to use as licensed premises.

In addition to their tied houses, the appellants own other licensed houses which they have during the year occupied by their managers or servants, and in respect of these and of the brewery and other premises occupied by the appellants for the purpose of their trade they have been allowed for repairs before the assessment was made the allowance to which they are entitled under the Income Tax Act, 1842, s. 100, first case, r. 3.

It was contended on behalf of the appellants: (*a*) That, having regard to the decision in *Smith* v. *Lion Brewery Co.* (1), the deductions claimed ought to be allowed. (*b*) That the licensed premises of which they are the owners and lessees have been acquired by them and were held by them in the course of and for the purpose of their said business and as a necessary incident to the more profitable carrying on of such business, and that the purchase and letting of licensed houses was an essential part of their business as brewers. (*c*) That in consideration of the tenants of their tied houses covenanting to buy all ales, beer, wines and spirits from the appellants only, those tenants pay a much less rent than the full annual value of the premises. (*d*) That by these means and the possession and use of the premises which are employed by the appellants as substantially necessary to carry on their business profitably the appellants are enabled to earn and do earn profits upon which they pay income tax, and which without the said premises and their user for the purposes aforesaid would be less in amount. That the appellants

(1) [1911] A. C. 150.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

had not acquired the premises as investments or for the purposes of investment. (*e*) That the repairs in question were a necessary outlay without which such profits could not have been earned, and that these form a legitimate deduction in arriving at the total gains in respect of which they are assessed under Sched. D. (*f*) That they are properly entitled to a deduction from their profits by their assessment under Sched. D in respect of the difference between the rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from their tenants of tied houses on the other hand. (*g*) That they are entitled to the above-named deductions for fire and licence insurance premiums, for rates and taxes, and for legal and other costs as necessary expenses in the conduct of their business, without which their profits as assessed under Sched. D could not be earned.

The surveyor of taxes on the other hand contended: (*a*) That the trade of the brewery is quite distinct from the trade of the public-house and that the expenses incurred in respect of the public-house cannot be deducted from the profits of the brewery, and that so far as the deduction for repairs was concerned the Commissioners were bound by the decision in *Brickwood & Co.* v. *Reynolds* (1) in the Court of Appeal. (*b*) That there was no authority for the deductions (*b*), (*c*), (*d*) and (*f*), claimed by the appellants as set forth above, on the ground that the decision as to repairs to tied houses covers these deductions by analogy. (*c*) That in estimating the balance of the profits and gains these sums should not be set against or deducted from such profits and gains, as being money wholly and exclusively laid out or expended for the purpose of such trade, and that with regard to the deductions sought under these heads also it is necessary to differentiate between the trade of the brewery and the trade of the public-house, and finally that these deductions are not authorized by the third rule of the first case, s. 100, Income Tax Act, 1842.

The Commissioners decided that the appellants were not entitled to any of the deductions claimed.

(1) [1898] 1 Q. B. 95.

Ryde, K.C., and *Latter*, for the appellants. The general principle upon which the assessment under Sched. D must be based is stated in the first rule under the first case in s. 100 of the Income Tax Act, 1842, that is, the assessment is to be upon the "full amount of the balance of the profits and gains." All the expenses here in question are incurred in order to earn the gross profits and must therefore be deducted in order to ascertain the balance of profits and gains. The first rule of the rules applying to the first and second cases in s. 100 provides that no sum shall be deducted, in estimating the balance of profits and gains, which is not "wholly and exclusively laid out or expended for the purposes of such trade." These expenses were wholly and exclusively incurred for the purposes of the appellants' business. It is irrelevant to say that a part of such expenditure may enure for the benefit of some one else. All the expenses, not being capital expenditure, incurred for the purpose of earning and increasing the profits of the business must be allowed in estimating the balance of profits and gains. In *Watney & Co.* v. *Musgrave* (1) the real ground of the decision was that the allowance claimed was in respect of capital expenditure; and the reasoning of the judgments has been subsequently disapproved: *Reid's Brewery Co.* v. *Male.* (2) The decision in *Brickwood & Co.* v. *Reynolds* (3) in the Court of Appeal turned upon r. 3 under the first case in s. 100, which does not apply in the present case; and further there was no finding of fact in that case, as in this case, that the premises had been acquired solely for the purpose of, and necessarily for the more profitably carrying on, their business and to enable them to earn the profits on which income tax is paid. That finding brings this case within the decision in *Reid's Brewery Co.* v. *Male.* (2) The principle to be applied was thus stated by Lord Herschell in *Russell* v. *Town and County Bank* (4): "The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts." It is found in this case that all the expenses in question were necessary for such purpose and were

(1) (1880) 5 Ex. D. 241.
(2) [1891] 2 Q. B. 1.
(3) [1898] 1 Q. B. 95.
(4) (1888) 13 App. Cas. 418, 424.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

incurred exclusively for the purpose of the trade. After the case of *Smith* v. *Lion Brewery Co.* (1) the decision in *Brickwood & Co.* v. *Reynolds* (2) can stand only upon the ground that r. 3 of the rules under the first case in s. 100 was applicable in that case.

Sir John Simon, A.-G., and *W. Finlay*, for the respondent. With regard to the claim for an allowance in respect of repairs, the decision of the Court of Appeal in *Brickwood & Co.* v. *Reynolds* (2) was that such a claim can only be made by a person who himself occupies the premises, and in this case the premises are not so occupied. That point, therefore, is concluded by an authority binding upon this Court.

As to the claim in respect of the difference between rents received and the full annual value, the argument for the appellants is fallacious. If, for good commercial reasons, the appellants let a house to a tenant for 30*l.* a year when its full annual value is 50*l.*, the tenant in making his return for income tax under Sched. D is entitled to deduct the full value of 50*l.* and not merely the rent which he pays: *Gillatt & Watts* v. *Colquhoun* (3); *Russell* v. *Town and County Bank.* (4) That being so, the appellants cannot be entitled to deduct the difference, for that would be making the same allowance twice over; the whole has been allowed to the tenant, and the landlord cannot have the same allowance.

In *Smith* v. *Lion Brewery Co.* (5) Channell J. said that the expense incurred for the purpose of insuring cannot be said to be wholly and exclusively incurred for the purposes of the company's trade.

[HORRIDGE J. In that case Lord Atkinson (6) treats it as clear that the insurance premiums can be deducted.]

The legal expenses cannot be claimed as a deduction: *Southwell* v. *Savill Brothers.* (7)

With regard to all the items claimed as deductions, none of them can be said to have been "wholly and exclusively laid out or expended for the purposes of such trade."

(1) [1909] 1 K. B. 711; 2 K. B. 912; [1911] A. C. 150.
(2) [1898] 1 Q. B. 95.
(3) (1884) 2 Tax Cases, 76.
(4) 13 App. Cas. 418.
(5) [1909] 1 K. B. 711, 721.
(6) [1911] A. C. 150, 162.
(7) [1901] 2 K. B. 349.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

Ryde, K.C., in reply. In *Gillatt & Watts* v. *Colquhoun* (1) the appellants sought to make a deduction in respect of a bad bargain in buying premises for more than they were worth. It is contended that, because the tenant can deduct the full annual value of the premises though more than his rent, therefore the landlord cannot deduct for his loss; but the tenant and the landlord are entirely different persons making a return in respect of different incomes, and it could not be a case of making the same allowance twice over: *Russell* v. *Town and County Bank* (2); *Tennant* v. *Smith.* (3)

The general rule is stated by Collins M.R. in *Strong & Co.* v. *Woodifield* (4), where he says: "All expenses necessary for the purpose of earning the profits may properly be deducted, but expenses to come out of the profits after they are earned cannot be deducted"; and that statement was adopted by Cozens-Hardy M.R. in *Smith* v. *Lion Brewery Co.* (5)

Cur. adv. vult.

Dec. 12. HORRIDGE J. (6) This is an appeal from the Commissioners for General Purposes of the Income Tax Acts for the tax division of Trowbridge, in the county of Wilts, whereby they found that the appellants, a brewery company, were not entitled to make any of the deductions, set out in paragraph 1 of the case, from the profits earned by them and upon which they were assessed under Sched. D. The first and third rule to the first case under Sched. D, and the first rule applying to both the first and second cases of Sched. D, are the rules under which the questions as to these deductions arise.

To deal first with the deduction claimed to be made in respect of repairs to tied houses. In the case of *Brickwood & Co.* v. *Reynolds* (7) the Court of Appeal decided that the provision of s. 100, case 1, r. 3, of the Income Tax Act, 1842, which authorizes deductions in estimating the balance of profits and gains in a trade in respect of the expenditure on repairs of premises occupied for the purpose of such trade, applies only to

(1) 2 Tax Cases, 76.
(2) 13 App. Cas. 418, 427.
(3) [1892] A. C. 150.
(4) [1905] 2 K. B. 350, 356.
(5) [1909] 2 K. B. 912, 919.
(6) The judgment was written.
(7) [1898] 1 Q. B. 95.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

Horridge J.

premises occupied by the person assessed, and that r. 3 contains both a permission and a prohibition, and that, in the case of repairs which do not come within the permission which only applied to the case of occupation by the person assessed, they necessarily fall within the prohibition and cannot be deducted. I am, therefore, bound by this decision to hold that the Commissioners were right in holding that no deduction could be made in respect of repairs.

The next deduction asked for was the difference between the rents of leasehold houses, or Sched. A assessment of freehold houses, on the one hand, and rents received from tied tenants on the other hand. The facts with regard to this claim are set out in the case and also in the supplemental statement of facts. They may be shortly summarized by saying that the sole inducement to the brewery company to let tied houses at less than their proper rents is to obtain a larger profit from their business as brewers and that they would not own such premises except for their business advantage.

The test of what is the balance of profits and gains upon which duty is to be assessed is, in the language of Lord Herschell in *Gresham Life Assurance Society* v. *Styles* (1), "the balance arrived at by setting against the receipts the expenditure necessary to earn them." The Master of the Rolls (Lord Collins) in *Strong & Co.* v. *Woodifield* (2) says: "All expenses necessary for the purpose of earning the profits may properly be deducted, but expenses to come out of the profits after they are earned cannot be deducted." These two definitions are quoted by Cozens-Hardy M.R. in *Smith* v. *Lion Brewery Co.* (3) In the report of *Smith* v. *Lion Brewery Co.* (4) Channell J. puts the very case of the loss of rents with which I am now dealing. He says: "If a brewery company receives less rent than it pays for a public-house, of which it is a tenant and which it underlets, because the undertenant is bound to buy all his beer from the company, is not the difference in rent an expense of the trade of the brewery in the sale of the beer, and can it not be deducted as such in estimating the profits and gains of that trade?"

(1) [1892] A. C. 309, 323.
(2) [1905] 2 K. B. 350, 356.
(3) [1909] 2 K. B. 912, 919.
(4) [1909] 1 K. B. 711, 715.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

Horridge J.

The findings with regard to this matter are in effect, I think, the same findings as those in *Smith* v. *Lion Brewery Co.* (1) and which are set out in the judgment of Farwell L.J., and this loss in rent was an expenditure which, within the words of the Master of the Rolls (2), was "essential to the earning of the profits and not a deduction from the balance of profits," and I am of opinion, on the authority of *Smith* v. *Lion Brewery Co.* (3), that the appellants are entitled to the deductions under this head.

I think on the facts found the fire and licence insurance premiums, and the rates and taxes, were all expenditure essential to the earning of the profits, and I think they also are governed by *Smith* v. *Lion Brewery Co.* (3) and are proper deductions. I would also, as regards the insurance premiums, draw attention to the language of Lord Atkinson in *Smith* v. *Lion Brewery Co.* (4), where he says: "If a publican insure the licensed premises against destruction by fire, his paramount purpose is to insure against the loss of his trade and business, though incidentally he insures against the destruction of the fabric in which, apart from the licence, he may have little or no interest. Yet it is not, as I understood, contended that the payment of the premium in such a case should not be deducted from his receipts as an expenditure made wholly and exclusively for the purposes of his trade."

The only remaining deduction is legal and other costs. As to these it was agreed between counsel that I must treat these legal expenses as not being incurred for any extension of the business so as to make them capital expenditure. If, therefore, they are regarded as average annual payments in respect of the various matters mentioned in the supplemental statement, I think they would be expenses essential to the earning of the profits, and therefore come within the principle of *Smith* v. *Lion Brewery Co.* (3)

With regard to the question of the deduction of the difference in rentals, the Attorney-General contended that the effect of *Gillatt*

(1) [1909] 2 K. B. 912, 920.
(2) [1909] 2 K. B. at p. 920.
(3) [1909] 2 K. B. 912; [1911] A. C. 150.
(4) [1911] A. C. 150, 162.

1913

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

Horridge J.

& Watts v. *Colquhoun* (1), and the language of Lord Herschell in *Russell* v. *Town and County Bank* (2), was that the tied tenants of these houses would be assessed under Sched. A for property tax upon the full value of the houses and that from those tenants' profits would be deducted, for the purpose of Sched. D, not merely the rents they paid to the appellants but the actual annual value. In this way, he said, the tenant gets the benefit in his assessment to income tax under Sched. D of the full value of the premises and necessarily of all the difference in rent which the appellants are now asking to be allowed in their account for income tax under Sched. D. I think this probably, as regards the tenant, is correct, but I cannot see why one should inquire into a separate and distinct income tax assessment for the purpose of depriving the appellants of an allowance in respect of an expenditure which, in their business, it was necessary to incur to earn the profits on which they are to be assessed.

The appeal must be allowed as to the items other than the item for repairs and dismissed as regards the item for repairs.

Appeal allowed in part.

Solicitors for appellants : *Godden, Holme & Ward.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

(1) 2 Tax Cases, 76. (2) 13 App. Cas. 418, 425.

J. H. W.

[IN THE COURT OF APPEAL.]

C. A.

1913

June 13, 16, 17.

THE KING *v.* ROBERTS.

London—Rates—Parliamentary Borough—Tenement wholly let out in Apartments or Lodgings—Abatements or Allowances—Surcharge by Auditor—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.

The council of a metropolitan borough, which became a parliamentary borough some years after the passing of the Representation of the People Act, 1867, rated the owners of two dwelling-houses which were wholly let out in apartments or lodgings not separately rated, and allowed them the commissions or abatements authorized by the Poor Rate Assessment and Collection Act, 1869. The local government auditor at his audit made a surcharge on the rate collector in respect of the amount of these abatements :—

Held, reversing the decision of a Divisional Court, that the words "all boroughs" in s. 7 of the Representation of the People Act, 1867, extended to all boroughs which had since the passing of that Act become parliamentary boroughs and were not limited to boroughs which were in existence as parliamentary boroughs at the date of its passing; that the owners ought to have been rated under that section and were therefore not entitled to any commission, abatement, or deduction from the amount of the rate; and that the surcharge was therefore rightly made by the auditor.

White & Hales v. *Islington Corporation* [1909] 1 K. B. 133, considered, *West Ham Churchwardens* v. *Fourth City Mutual Building Society* [1892] 1 Q. B. 654, distinguished.

Appeal from the decision of a Divisional Court (Lord Alverstone C.J., Phillimore J., and Avory J.) making absolute a rule nisi calling upon A. Carson Roberts, the auditor of the accounts of the metropolitan borough of Battersea, to shew cause why a writ of certiorari should not issue directed to him to remove into the High Court certain surcharges made by him as such auditor, amounting to 2*l.* 8*s.* 10*d.*, specified in his certificate of March 29, 1912, as having been disallowed by him in the accounts of the said borough for the year ending March 31, 1911, on the grounds (1.) that there was no negligence or misconduct on the part of the person surcharged; (2.) that the allowance or abatement made by the person surcharged was properly made by the borough council under the Poor Rate Assessment and Collection Act, 1869.

C. A. 1913

REX v. ROBERTS.

From an affidavit of the town clerk of the borough of Battersea it appeared that the accounts of the borough council were subject to an annual audit by an auditor appointed by the Local Government Board under ss. 247 and 250 of the Public Health Act, 1875, which, by the combined effect of s. 14 of the London Government Act, 1899, and s. 91, sub-s. 3, of the Local Government Act, 1888, were made applicable to the accounts of metropolitan borough councils. It went on to say that for the purpose of collecting the general rate of the borough, which was assessed, made, collected, and levied by the council as overseers under s. 10, sub-s. 2, of the Local Government Act, 1888, the council employed collecting clerks, one of whom was Mr. F. Cathie. Among the accounts submitted to the auditor were the books of accounts of the said F. Cathie, kept under the direction of the council, shewing the amounts collected by him for the purpose of the said rate. In one of the books the auditor surcharged upon him sums amounting to 2*l.* 8*s.* 10*d.*, and gave a certificate of such surcharge in the following terms:—

"I do hereby certify that in this account of Frederick Cathie, a collecting clerk or rate collector employed by the council of the metropolitan borough of Battersea, I have surcharged upon him sums amounting to two pounds eight shillings and tenpence (2*l.* 8*s.* 10*d.*) these being the amounts of loss to or deficiency in the funds of the said council arising from allowances and abatements made by him in the collection of the rate due from the owner of two dwelling-houses in respect of the half-year ended on the 31st March, viz.,

Dwelling-house.	Rateable Value.	Percentage Allowance.		Abatement in respect of Unoccupied Houses.
		Rate.	Amount.	
No. 25 Rush Hill Road	£28	20 %	£1 2 10	—
,, 19 ,, ,, ,,	£29	15 %	0 15 4	10*s.* 8*d.*
			£1 18 2	10*s.* 8*d.*

Because the said rates were assessable in full upon the owner of the said dwelling-houses under the provision following sub-s. 2 of s. 7 of the Representation of the People Act, 1867, the said

dwelling-houses being at the time of the making and collecting of the rate in question wholly let out in apartments or lodgings which were not separately rated in 1867, and the borough of Battersea having for a number of years been a parliamentary borough, although it was not such in whole or in part for the year 1867, and because the provisions contained in s. 7 of the Representation of the People Act, 1867, must be read as applying from time to time to dwelling-houses situate in a parish which is wholly or partly in a parliamentary borough, there being no reason or decision to apply a different interpretation thereto, and because no commission or allowance under s. 3 of the Poor Rate Assessment and Collection Act, 1869, or under any other provision could be lawfully allowed to the owner in respect of such rates, and because no abatement of the said rates could lawfully be made in respect of unoccupied rooms in the said houses, and because by making the said allowances and abatement in demanding and collecting the said rates the said Frederick Cathie has incurred a loss of or deficiency of two pounds eight shillings and tenpence (2*l.* 8*s.* 10*d.*) in the funds of the said council."

The auditor made a report to the council in the following terms:—

"The Rating of Houses wholly let out in rooms.

"The recent decisions of the Courts of law make it clear that in parishes wholly or partly in a parliamentary borough the rates upon those houses have to be assessed upon and collected from the owners under the provision following sub-s. 2 of s. 7 of the Representation of the People Act, 1867. The only doubt which is connected with the matter in this case is whether the words of the section 'situate in a parish wholly or partly within a borough' are to be read as referring to the time of the passing of the Act, or as applying from time to time to parishes which are wholly or partly in a parliamentary borough. Battersea was not wholly or partly in a parliamentary borough in 1867, but it has now been so for upwards of twenty years, and the practice of assessing such houses in separate items upon the occupiers of the separate floors or sets of rooms has been extending, and in the last two years has become more general than it ever was before.

C. A. 1913

REX v. ROBERTS.

"As I am not aware of any decision or reason which would set aside the ordinary principle of interpretation which would make the words 'wholly or partly in a parliamentary borough' apply to the conditions from time to time obtaining, I have decided to raise the question of the legality of the allowances made to these owners by taking a test case."

By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, it is provided that "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"(1.) After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned:

"(2.) The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate book:

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate . . . ."

By the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3, it is provided that "In case the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis, or thirteen pounds if situate in any parish wholly or partly within the borough of Liverpool, or ten pounds if situate in any parish wholly or partly within the city of Manchester or borough of Birmingham, or eight pounds if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay

the poor rate whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and allow him a commission not exceeding twenty-five per cent. on the amount thereof."

By s. 4, "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect. (1.) The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate; (2.) if the owner of one or more of such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated . . . . Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling-house shall not be included."

The houses in the case were wholly let out in separate apartments or lodgings, the rateable value of each house was under 20*l.* per annum, and the owners were rated under s. 4 of the Poor Rate Assessment and Collection Act, 1869.

The Divisional Court, following *West Ham Churchwardens* v. *Fourth City Mutual Building Society* (1), held that the words "situate in a parish wholly or partly in a borough" in s. 7 of the Representation of the People Act, 1867, were limited to boroughs which were in existence in the year 1867, and that consequently the allowances or abatements were properly made and the surcharges were wrong.

The auditor appealed.

(1) [1892] 1 Q. B. 654.

C. A. 1913

REX v. ROBERTS.

The Appellant in person. The surcharge was properly made. The question raised is the same as that in *White & Hales* v. *Islington Corporation* (1); it affects the legality of allowances made to owners in the payment of rates on dwelling-houses wholly let out in apartments or lodgings not separately rated, within the meaning of s. 7 of the Representation of the People Act, 1867 (30 & 31 Vict c. 102). The question is whether s. 7 applies to Battersea, which was not a parliamentary borough in 1867 at the date of the passing of that Act, but became one in 1885. It is submitted that s. 7 applies to all parliamentary boroughs, whether they were such in 1867 or not. The section itself provides that the following enactments shall take effect with respect to rating "in all boroughs," and there is no reason why any limitation should be placed upon the generality of the words used. The provisions of ss. 3 and 4 as to new franchises in boroughs are just as open to limitation as are those of s. 7, but they have always been taken to apply to new boroughs as they came into existence. The clear object of s. 7 is to bring rating enactments into conformity with franchise provisions, and they must apply to all boroughs to which the franchise provisions are applicable. The case of *West Ham Churchwardens* v. *Fourth City Mutual Building Society* (2) will be cited against me, but it has nothing to do with the present case; the question there raised was whether Sturges Bourne's Act of 1819 could be made use of in 1891 for the purpose of rating owners, and there is nothing in the report to shew that the effect of s. 7 of the Act of 1867 was argued. The present case is not one where the owner is substituted for the occupier under s. 4 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41); it is one where the owner is rated under s. 7 of the Act of 1867.

Sylvain Mayer, for the respondents. The main question is whether *White & Hales* v. *Islington Corporation* (1) applies to boroughs which were not parliamentary boroughs in 1867; that was impliedly decided in the negative in *West Ham Churchwardens* v. *Fourth City Mutual Building Society*. (2) The latter decision is good law and ought not to be overruled.

The Appellant in reply.

(1) [1909] 1 K. B. 133. (2) [1892] 1 Q. B. 654.

VAUGHAN WILLIAMS L.J. We have had a long discussion in this case, which has turned very much on the interpretation of the Act of 1867.

The Lord Chief Justice says: "Mr. Roberts (and I am by no means saying he is wrong) has, as auditor, decided that, the dwellings or tenements being wholly let out in apartments or lodgings not separately rated, the owner shall be rated in respect thereof to the poor rate. If the owner is to be rated for the whole house, then I think it follows that the surcharges are perfectly right. The auditor made them up on the ground that at any rate the first paragraph of s. 7 of the Act of 1867 applies to rating in all parliamentary boroughs, and he says (and there is a good deal of force in it, and I do not for a moment say that it is not a matter which wants very careful consideration) that it was not intended to be limited to parliamentary boroughs then in existence." I think that that is the right construction of s. 7 and that, notwithstanding the words at the beginning of s. 7 of the Act of 1867, these words are not to be limited in their application to houses which were in existence in a parliamentary borough at the time of the passing of this Act of 1867, but apply to houses in new parliamentary boroughs arising from time to time in the course of the history of this district. I ought to read here a word or two more from the judgment of the Lord Chief Justice. He says (1): "I have had to follow or attempt to follow" (I sympathize with that) "the case of *White & Hales* v. *Islington Corporation* (2) since the decision of the Court of Appeal, and in trying to follow it loyally I only say it is extremely difficult to work these various Acts of Parliament. If *White & Hales* v. *Islington Corporation* (2) is held to be a governing authority, it renders practically inoperative the sections which would seem upon their face to be intended to apply to all cases of owners being rated for the purpose of the poor rate, and it would make s. 7 of the Act of 1867 a rating enactment as well as a franchise enactment." I respectfully agree with the Lord Chief Justice in that observation, that is to say, if we put the construction upon s. 7 which I am disposed to put, we do in respect of this exception in s. 7 really treat the Act of Parliament

(1) (1912) 77 J. P. at p. 71. (2) [1909] 1 K. B. 133.

C. A. 1913

REX v. ROBERTS.

Vaughan Williams L.J.

pro tanto as not only a franchise Act but a rating Act. What the section has said is that " after the passing of this Act " (we must take it now, in my opinion, as future houses in future parliamentary boroughs as well as those in existence at the time of the passing of the Act of 1867) the liability of the owner to be rated whether under Sturges Bourne's Act or under the various local Acts or otherwise shall cease, subject to an exception which is going presently to be stated. That exception is the exception which comes after sub-ss. 1 and 2 : " Where a dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." Under those circumstances I think that the contention of Mr. Roberts as to this part of the case was right. I have read that observation of the Lord Chief Justice, and I agree with his observation. I agree that it is a difficult Act of Parliament to construe, but I adhere to the construction that I have mentioned, although I do recognize the force of the observation which the Lord Chief Justice has made. There was an argument (and the Lord Chief Justice deals with it) as to what was the effect of the judgment of A. L. Smith and Mathew JJ., who decided the case of *West Ham Churchwardens* v. *Fourth City Mutual Building Society*. (1) It is said that the judgment of A. L. Smith J. did hold really that Sturges Bourne's Act was (not by express words but by implication) repealed. There have been various Acts of Parliament, private Acts of Parliament, or local Acts of Parliament, which dealt with the matter somewhat on the same lines as Sturges Bourne's Act, which was an Act really in some cases relieving the occupier and charging the owner, and it is said that this decision by implication revokes or repeals Sturges Bourne's Act and these other local Acts. I said in the course of the argument that I did not take the view myself that the judgment of A. L. Smith J. did really repeal Sturges Bourne's Act or these local Acts that I have spoken of. I said, rightly or wrongly, that, in my view, the decision of A. L. Smith J. in *West Ham Churchwardens* v. *Fourth City Mutual Building Society* (1) was merely a decision in which he took two alternative cases and said that, whichever

(1) [1892] 1 Q. B. 654.

of the two you took, quacunque via, certain things followed, and though one of those alternatives was the alternative of saying that Sturges Bourne's Act and these other Acts were repealed, I do not see that he decided that. I do not think, as far as my own opinion goes, that it is necessary that I should make up my mind absolutely as to whether Sturges Bourne's Act and these other Acts were repealed. I propose to deal with this case without the assistance of taking that view of the judgment in the *West Ham Case.* (1) I merely base my judgment upon the reading of the statute itself.

It seems to me that, if you take the statute as a whole, it is reasonably plain that s. 7 was not intended to apply only to the state of things at the time of the passing of the Act of 1867. The ultimate decision of the Lord Chief Justice is this. He bases it entirely on the judgment of A. L. Smith J. He says: "I do not deny that if I had been unfettered by the *West Ham Case* (1), I should have thought that there was a great deal to be said in favour of Mr. Roberts' view, and, in fact, I think I ought to say that, at present, my impression is in his favour; but it seems to me that we cannot, without disregarding the express language of A. L. Smith J.'s considered judgment, take that view, and I cannot see that the *West Ham Case* (1), inconsistent as it may seem to a certain extent with the real decision in *White & Hales* v. *Islington Corporation* (2), was ever doubted or dissented from, and certainly it was not overruled. In these circumstances it seems to me that some tribunal other than the Divisional Court must give effect to Mr. Roberts' arguments. For that reason I think that the decision upon this case must be in favour of Mr. Mayer, and that the rule to quash the surcharges must be made absolute." I can only say that I do not agree with that conclusion, and I do not agree with the view taken really of the judgment of A. L. Smith J. in the *West Ham Case.* (1) I only say that, going in detail, passage by passage, through the sections of the Act, in my opinion the Act of 1867 is an Act which applies to boroughs which were not parliamentary boroughs in 1867 and to houses which had no physical existence at that time at all.

(1) [1892] 1 Q. B. 654. (2) [1909] 1 K. B. 133.

C. A. 1913

REX v. ROBERTS.

Vaughan Williams L.J.

After a long discussion I do not wish to say anything that is unnecessary; but I must mention the Act of 1869. It is said that the Act of 1867 was a franchise Act, and that the Act of 1869 was a rating Act and the only Act that you can look at in solving this question which has come before us; and it is said that you find, if you look at the Act of 1869 (that is the rating Act), that it does, to a large extent, revive the right of owners to commission, as it is called sometimes, or to compensation, or reduction, or whatever it is called, in cases in which they are burdened with the payment of the rates instead of the occupiers. It is said that under those circumstances we ought to treat s. 7 of the Act of 1867 (in the particular part to which I have been referring) as really overruled by implication by the Act of 1869, if we do not hold that really it has no application to the future at all. I do not want to go into that question of the future any more. I have expressed my opinion. Those are the alternative arguments. I can only say that I do not see anything myself in this case or in the construction of the Act of 1869 which should compel us to treat the exception in s. 7 of the Act of 1867 as not being as effective as it clearly, to my mind, was intended to be in the interval between 1867 and 1869.

I think that I ought to say, as I am differing from the decision of the Divisional Court, something in regard to the other two judgments. Phillimore J. says: "I am of the same opinion. We did not hear Mr. Mayer to the full, and he may have had reasons for supporting his contention other than those which rest upon the *West Ham Case* (1), and therefore I express my opinion about that case with diffidence. But for that case, having heard no further argument from Mr. Mayer, I should have been inclined to think that Mr. Carson Roberts was right; but that case seems to be quite plain. The whole of this matter is artificial. There is no principle or sense in it. The channel is winding and tortuous, and the only safe navigation is to follow the decided cases." I say with satisfaction that the conclusion we have arrived at is the conclusion that Phillimore J. would have arrived at himself, if he had not felt himself bound

(1) [1892] 1 Q. B. 654.

by authority; that is, the authority of the other judgments in this matter.

Avory J. said much the same. He said: "I think it is impossible to say that any part of the judgment of A. L. Smith J. in the *West Ham Case* (1) was obiter, and, it being impossible to say that it was obiter, I agree that we are bound to follow it." I do not say that it was obiter, but I say that it was alternative, quacunque via, not "such a way this" or "such a way that," but "either way we arrive at the conclusion," and therefore without overruling him we may hold that one of the two ways applies or one of the two ways does not apply. The learned judge continues: "I only wish to add that I am not satisfied that the judgments in *White & Hales* v. *Islington Corporation* (2) do really support that decision upon the point which is now in question." I do not agree there. "No doubt the case was cited and not disapproved of. The Court would not go out of its way to disapprove of any portion of that judgment which was not necessary for consideration. If we were not hampered by the decision in the *West Ham Case* (1), I should certainly agree with the view which has been thrown out by my Lord and my brother Phillimore that 'all boroughs' would include the borough of Battersea."

It will be seen, I think, from the judgment that I have delivered, that is a judgment which my brethren substantially agree to, that there is really very little difference between this Court and the Divisional Court, because, but for thinking that they were bound by the judgment in the *West Ham Case* (1), the conclusions arrived at by the Lord Chief Justice and Phillimore and Avory JJ. would be really the same as the conclusions that I have expressed.

I think, therefore, for the reasons which I have given, that this appeal should be allowed.

So far I am only dealing with the first point. The other point will be dealt with to-morrow morning.

BUCKLEY L.J. Only a portion of the appeal which is before the Court is at the moment ripe for decision. The question is

(1) [1892] 1 Q. B. 654. (2) [1909] 1 Q. B. 133.

C. A. 1913

REX v. ROBERTS.

Buckley L.J.

whether certain surcharges of 1*l.* 18*s.* 2*d.* made by the auditor upon Frederick Cathie, the collecting clerk, or rate collector, employed by the council of the metropolitan borough of Battersea have, or have not, been properly quashed by the Divisional Court.

Before going further, I desire to say that the questions whether Cathie was the right person to act, whether negligence or misconduct on the part of the person surcharged has been shewn, and so on, have been expressly waived by the consent of the parties before us, and that we are asked to decide this question upon the footing that the 1*l.* 18*s.* 2*d.* has been surcharged and that the propriety of that surcharge can in these proceedings be properly determined by the Court. There would be technical questions which might be raised; but all those have been expressly waived, and, in pronouncing judgment, I am proceeding upon the footing that both parties agree in desiring the opinion of the Court, waiving all technical questions of any sort or kind.

The 1*l.* 18*s.* 2*d.*, the surcharge in question, arose in this way. We have to do with rating in a borough which was not in 1867, but now is, a borough. If the words "all boroughs" in s. 7 of the Act of 1867 include this, which was not in 1867, but now is, a borough, then the words of s. 7 which I am about to read apply. The words are, "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

The facts are that the apartments in question were not separately rated in 1867. Both parties have accepted that which in *White & Hales* v. *Islington Corporation* (1) I stated that I thought the words "not separately rated" mean, that is to say, both parties accept that they mean "not separately rated in 1867." These premises were such, for it is not known even that the house existed in 1867, much less that it was separately rated at that date. The premises, therefore, are premises to which the words in s. 7 which I have cited apply; and if the borough of Battersea be within the words "all boroughs," then,

(1) [1909] 1 K. B. 133, at p. 153.

under s. 7 of the Act of 1867, the owner is rateable and not the occupier. If, on the other hand, that is not so, then, under the Act of 1869, the occupier would be the person rateable; but, either by agreement under s. 3, or by order of the vestry under s. 4, the owner could be rendered liable for the rates, and the rates could be received from the owner, and, if the case falls within those sections, then certain commissions, abatements, or deductions are allowed by virtue of the provisions of ss. 3 and 4 of that Act. The surcharges in question, the 1*l.* 18*s.* 2*d.*, are abatements or deductions which have been allowed upon the footing that this case falls within the Act of 1869 and not within the Act of 1867. [Upon the facts stated on the following day it turned out that this was true only as to some of them.]

Under those circumstances the question for decision is whether the case falls within the Act of 1867. That turns upon the question whether it is a borough within the meaning of the words "all boroughs" in s. 7 of the Act of 1867. It is simply a question of the construction of the Act of 1867. The words "all boroughs" might mean all present boroughs, or might mean all present or future boroughs. Which does the phrase mean? In my opinion it means the latter. I arrive at that conclusion upon a review of the Act of Parliament as a whole and a consideration of the definition clause in the Act of Parliament.

Let me take the Act of Parliament generally to begin with.

I find in s. 3 this: "Every man shall in and after the year 1868 be entitled to be registered as a voter and, when registered, to vote for a member to serve in Parliament for a borough, who is qualified as follows." I do not suppose that anybody would dispute (if they did, I think they would be certainly wrong) that that is an enactment not confined to boroughs existing at that date, but an enactment as to what was to be the qualification for voting in boroughs generally, not boroughs at the date of the Act, but a borough whenever you found a borough in existence.

Sect. 4 is a section of like complexion: "Every man shall in and after the year 1868 be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve

C. A. 1913

REX v. ROBERTS.

Buckley L.J.

in Parliament for a borough, who is qualified as follows," and so forth. That must mean, and does mean (I hold without hesitation that it means), that that is an enactment which is to prevail in boroughs, meaning not boroughs in existence at the date of the Act of Parliament, but boroughs whensoever they exist.

Then, passing on, I find this—that by this Act of Parliament, s. 12, certain four boroughs, Totnes, Reigate, Great Yarmouth, and Lancaster, were to "cease to return members after the end of the present Parliament," and by s. 19 "Each of the places named in Schedule B to this Act annexed shall be a borough," and so on. So the Act is creating new boroughs, and is contemplating that the legislation will apply to boroughs existing and boroughs newly called into existence.

Passing on to the definition clause I find this: "The following terms shall in this Act have the meanings hereinafter assigned to them, unless there is something in the context repugnant to such construction; that is to say." One of them is "Member shall include a knight of the shire." Does that mean that "member" shall include a person who is at the present moment a knight of the shire? Of course not. It means "member" shall include a person who for the time being shall be a knight of the shire.

Then you come to "borough." "Borough" shall mean "any borough, city, place, or combination of places, not being a county as hereinbefore defined, returning a member or members to serve in Parliament." What does that mean in this Act of Parliament? Read the definition into the words of s. 4—"to vote for a member or members to serve in Parliament for a borough." That speaks, as it seems to me, not of the present only, but of the future also.

Take the next one. "Dwelling-house" shall include "any part of a house occupied as a separate dwelling." Does that mean "occupied at present as a separate dwelling"? No. It is a definition of what the word "dwelling-house" is to mean. Can you predicate that the dwelling-house at the moment that you are thinking of it is a part of a house occupied as a separate dwelling? All that seems to me to speak as of the time being

and not as of the moment at which the Act of Parliament is passed.

Before reading s. 7, let me say that the frame of it seems to me to be as follows. It is going to say: "There are cases in which owners under existing legislation are rated now. Such owners are not so to be rated in the future." Then it is going on to say: "The law in the future shall be as follows." The language runs thus: "Where the owner is rated"—that does not mean "where at the present moment a particular person being owner is rated." It means, "Where the legislation is such that the owner is the person who is put on the rate-book—that the owner is rateable, the owner and not the occupier." That is the first sentence. That speaks generally of legislation which imposes a liability. Then comes the clause on which the question arises. "His liability to be rated in any future poor rate shall cease," that is to say, that scheme of legislation shall come to an end, "and the following enactment shall take effect with respect to rating in all boroughs." That seems to me to say not that in a certain class of boroughs, namely, those now existing, to the exclusion of other boroughs shall the following enactment take effect, but that the following enactment shall take effect, not only in the boroughs which we have dealt with above by providing that a certain liability shall cease, but in all boroughs. That, as it seems to me, includes as well that which becomes a borough after the Act is passed as that which existed as a borough at the date when the Act took effect.

Under the Act of 1869 provision was made for reviewing the matter in the sense of throwing upon the owner again under certain circumstances the liability which had been taken off his back by s. 7 of the Act of 1867. Under the Act of 1867 the owner was not rateable, except in the particular cases mentioned there. Under the Act of 1869 he could be made rateable. There were two courses. It could be done by agreement under s. 3, or the vestry were empowered to make an order under which he would become liable, under s. 4. Those provisions, therefore, are provisions which have effect where, but for the agreement or the order, the occupier would be the person rateable. The owner is substituted for him under certain

C. A. 1913

REX v. ROBERTS.

Buckley L.J.

circumstances and with results which are provided by the Act. If the owner pays instead of the occupier, he is to receive certain abatements or deductions. These, of course, have nothing to do with the case, if it be a case in which the owner is still under the provisions of s. 7 of the Act of 1867 the party rateable—a case in which the owner is not paying rates in lieu of some one else, saving the rating authority something by the fact that they get it from one hand instead of many, but is paying in discharge of a liability of his own existing by virtue of the words of s. 7 of the Act of 1867.

It follows from what I have said, if it be right, that the owner is here paying by virtue of his liability under s. 7. The result is that he is not entitled to the abatement or deduction under the Act of 1869.

We have been pressed a great deal with some suggested conflict or difficulty between the Act of 1867 and the Act of 1869. I confess that I see none. It is plain that, if the owner is rateable under the Act of 1867, he has to pay. If he is not rateable, but the occupier is rateable, then the 1869 Act takes up the matter, and if, under the provisions of that Act, the owner pays, although the occupier ought, but for certain things, to have paid, then he is to have certain allowances. That is not this case. The whole question is whether the case is one which falls within the words "all boroughs" in s. 7.

Frequent reference has been made to the decision of this Court in *White & Hales* v. *Islington Corporation* (1) and to the decision of the Divisional Court in *West Ham Churchwardens* v. *Fourth City Mutual Building Society*. (2) The *West Ham Case* (2) was a case like the present; that is to say, it was the case of that which was not a borough in 1867 and became a borough before the decision of that case. A. L. Smith J., in giving the decision of Mathew J. and himself in that case, said: "It appears to us that this section (s. 7) is made to apply only to owners rated in respect of premises situated in a parliamentary borough at the date of the passing of that Act, that is, on August 15, 1867. The premises in question in this case at West Ham at that date were not situated in a parliamentary borough,

(1) [1909] 1 K. B. 133. (2) [1892] 1 Q. B. 654.

for West Ham never became a parliamentary borough till eighteen years afterwards, namely, in 1885."

From what I have said, it will result that I have the misfortune not to agree with what was said by A. L. Smith J. in that case. It appears to me that the fact that the borough has become a borough since 1867 does not determine the case.

I wish to add a word as to what I myself said in *White & Hales* v. *Islington Corporation* (1) as to the *West Ham Case.* (2) I expressed neither a view in favour of, nor a view adverse to, the decision in the *West Ham Case.* (2) It was unnecessary to express a view either the one way or the other, because the two cases were different in an essential particular. In the *West Ham Case* (2) the borough was not a borough in 1867. In *White & Hales* v. *Islington Corporation* (1) it was a borough in 1867. Therefore the question in the *West Ham Case* (2) did not arise. What I said in *White & Hales* v. *Islington Corporation* (1) as regards the *West Ham Case* (2) was this: "It is scarcely necessary to point out that the words of A. L. Smith J. in the *West Ham Case* (2), that 'If it is now sought to rate the owner instead of the occupier, the Act of 1869 is the only Act which can be applied to for that purpose,' are confined to the case there before the Court, that is, where the premises are not in a parliamentary borough—that is to say, are premises to which the Act of 1867 does not apply—and have no bearing upon the case of premises in a parliamentary borough to which alone the Act of 1867 applies." The Court in the *West Ham Case* (2) was holding that the premises were premises to which the Act of 1867 did not apply, and I was pointing out that upon the hypothesis (which for the purpose of applying that case it was necessary to make) that this was so the learned judge's words had no bearing upon the case in which the premises were premises to which the Act of 1867 did apply. I was expressing no opinion at all that the Act of 1869 was the only Act to which reference could be made in a case in which the borough had become a borough since the passing of the Act of 1867.

For these reasons it seems to me that the owner here was properly rated under s. 7 of the Act of 1867, that the case is not

(1) [1909] 1 K. B. 133. (2) [1892] 1 Q. B. 654.

C. A. 1913

REX v. ROBERTS.

within the Act of 1869, and that therefore the abatement or deduction was not allowable and the surcharges were good. The appeal therefore, I think, ought to be allowed.

HAMILTON L.J. I agree. So far as the allowances of 1*l.* 2*s.* 10*d.* and 15*s.* 4*d.* are concerned, they were rightly surcharged, and the decision of the Court below, quashing the surcharge pro tanto, was wrong and should be reversed.

No question now arises as to the party to be surcharged, because Mr. Sylvain Mayer, in the wise exercise of his authority as counsel, has forborne to raise any point connected with the position of the actual collector, so that, for whatever it may be worth, our decision upon this point may be obtained.

The Divisional Court, bound, as it felt itself to be, and rightly felt itself to be, by the case of *West Ham Churchwardens* v. *Fourth City Mutual Building Society* (1), held, I think reluctantly, that the Act of 1867, s. 7, only applies in the cases of tenements in boroughs which, at the passing of that Act, were already parliamentary boroughs.

The words in the judgment of the Court in the *West Ham Case* (2) explicitly cover the point: "It appears to us that this section is made to apply only to owners rated in respect of premises situated in a parliamentary borough at the date of the passing of that Act, that is, August 15, 1867. Consequently this 7th section of the Act of 1867 has no application to owners of property in West Ham," a borough which only became a parliamentary borough at a later date. With those words I cannot agree. I say nothing whatever about the decision in that case, which is not before us. Those words were clearly part of the reasoning of the Court. They appear to me to be erroneous.

For the reasons which have been given, and, as far as I am concerned, sufficiently given, I think that the words of exception in s. 7 of the Act of 1867 laying down the case in which in all boroughs the owner of the tenement is still to be rated, are words which apply to tenements in the present tense, and that the two tenements in question fall within the description given in the exception clause, and I think, further, that Battersea falls within

(1) [1892] 1 Q. B. 654. (2) [1892] 1 Q. B. at p. 659.

the words "in all boroughs." True, in the first sentence of s. 7 necessarily the Legislature is dealing with boroughs then in existence, because it was terminating a state of things theretofore existing. The words "in all boroughs" naturally mean in all boroughs, and I have great difficulty in apprehending the refined reasoning by which, in a parliamentary sense, "in all boroughs" means not in all boroughs but only in some. It is quite clear to my mind that, not only in the subsequent words "within a borough," but also in all the other references to "a borough" or "the borough" in the principal enacting parts of the Act, the statute is dealing with boroughs hereafter to come into existence, as well as boroughs then existing. It is conceded that in the case of one class of such boroughs, namely, those created by the Act itself, it must be so. I think, therefore, that the case falls within s. 7.

Of the case of *White & Hales* v. *Islington Corporation* (1), I need only say, after the judgment of Buckley L.J., that it appears to me in no way to conclude any part of the present argument. I concur, therefore, in the view that, so far as this point is concerned, the appellant succeeds in his appeal.

Counsel then proceeded to argue the question of the abatement of 10*s.* 8*d.* on account of an unoccupied room in No. 19, Rush Hill Road, and it was agreed that the parties should furnish the Court with an agreed statement of facts on the point supplemental to the town clerk's affidavit. The supplemental statement was in the following terms:—

1. In the quinquennial valuation list made by the council on June 1, 1905, which came into operation on April 6, 1906, No. 19, Rush Hill Road was described under an entry of which the following is a copy:—

Assessment No.	Occupier.	Owner.	Description of Property.	Name of Property.	Values fixed by Assessment Committee.	
					Gross.	Rateable.
976	Edwin Henry Howard	Thomas Lambshead	House	19, Rush Hill Road	£36	£29

(1) [1909] 1 K. B. 133.

C. A. 1913

REX v. ROBERTS.

Such house was originally rated in a single item (as above) in the general rate made on October 1, 1910, and would have remained so rated without any allowance under the Act of 1869 as the rateable value was over 20*l.* but for the provisional list next hereinafter mentioned.

The entry in the rate-book before the provisional list is shewn in the statement annexed hereto.

2. On October 11, 1910, a provisional valuation list was made by the council, which came into operation on October 13, 1910, and in such provisional list the house in question, which was then let in separate parts, the rateable value of each of which was under 20*l.* per annum, was described under an entry of which the following is a copy :—

No.	Occupier.	Owner.	Description of Property.	Situation of Property.	Values fixed by Assessment Committee.	
					Gross.	Rateable.
44	Keeley	Lambshead, Miss E. M. W., 176, Mitcham Road, Tooting	Ground floor and one room top	19, Rush Hill Road	£15	£12
45	Botwright	Ditto	1st floor	19 Ditto	£13	£10
46	—	Ditto	1 room top	19 Ditto	£6	£5

3. In collecting the general rate made on October 1, 1910, which was for the half-year ended on March 31, 1911, the owner of the house was rated and assessed to such rate under s. 4 of the Act of 1869. The room on the top floor of the house, which was separately assessed at 5*l.* rateable value, was unoccupied from October 1 to December 31, 1910, and as there was no agreement under s. 4 of the Act of 1869 between the council and the owner of the house, the council could not (under the Act of 1869) enforce the payment of rates in respect of such room for the period during which it was unoccupied.

4. The full rate for the half-year on the room referred to was 1*l.* 1*s.* 3*d.*, and one half that amount, namely, 10*s.* 8*d.*, was marked off in the rate-book as irrecoverable in respect of the quarter

during which the room was unoccupied. This sum of 10*s.* 8*d.* is one of the items appearing in the auditor's certificate of surcharge previously set out.

5. The entry in the rate-book giving the rating of No. 19, Rush Hill Road after the provisional list before referred to came into operation is shewn in the statement annexed thereto.

The Appellant in person.

Sylvain Mayer, for the respondent.

The Court, having regard to the absence of materials, declined to give judgment on the question of the surcharge in respect of the abatement allowed for the unoccupied room, but delivered the following judgments.

VAUGHAN WILLIAMS L.J. I do not think we can congratulate the local authority here on the way in which this matter has been brought before either the Divisional Court or ourselves. It is common ground that one part of the order which was made in the Divisional Court, that is to say the latter part of the order, was not discussed at all. In truth and in fact, it never was before the Court. Then again yesterday we had the point that we disposed of yesterday before us. Even there the whole matter that we had to deal with, and the whole matter that we did deal with, was the application of s. 7 of the Act of 1867. We were not dealing with figures in any way whatsoever. It was put before us that s. 7 did not apply, and that the matter ought to be dealt with under the Act of 1869. It was the abstract question which we decided, and we decided that, as the matter was brought before us, the contention of the appellant here was right, and that s. 7 of the Act of 1867 did apply and was not altered or modified, as was suggested, by the sections in the Act of 1869. There the matter stands as far as the point dealt with yesterday was concerned.

We have now got this further point to dispose of to-day. That is the point as to which I said there was really no discussion at all. The order that was made by the Court has been appealed against so far as this matter of the unoccupied room is

C. A. 1913

REX v. ROBERTS.

Vaughan Williams L.J.

concerned; but it never was discussed before the Court, and, in our judgment, the matter has never been judicially discussed at all.

Under those circumstances, what we are asked to do is to discharge this part of the order, that is to say, to discharge that part of the order which affirmed that the surcharge was wrong. We cannot simply say that we discharge that order, because that would leave us in this position—that we should be deciding that the surcharge was right. We do not propose to leave things in any such condition at all. The matter has never been heard and never been properly discussed. We will discharge the order, not leaving the surcharge a good surcharge, but for the purpose that hereafter this very question, the question in respect to this identical rating and assessment of this unoccupied room, may be discussed. The opportunity is given, just as if the matter had never appeared in any way in the proceedings in the Divisional Court, for it to be discussed afresh; so that the result here is that we are of opinion that this matter has never been properly before the Court, and we leave the parties at liberty to raise this question with reference to this identical room and this identical charge.

BUCKLEY L.J. Yesterday the Court decided that the words "all boroughs" in s. 7 of the Act of 1867 mean all present and future boroughs, and that Battersea, although not a borough in 1867, being a borough now, is within the words "all boroughs" in s. 7, and that the owner was properly rateable therefor under that section, and was not entitled to abatement or deduction under the Act of 1869. Since we gave judgment yesterday, some figures, which were not before us yesterday, have been put before us. We have now extracts from the rate-book, and it appears that the owner has not been rated in respect of this house, No. 19, Rush Hill Road, as one rateable hereditament, but that by a provisional valuation he has been rated in respect of three separate rateable hereditaments consisting of different floors in that house, the aggregate amount coming to a certain figure and the deductions amounting to the sum of 1*l.* 18*s.* 2*d.*, which was mentioned yesterday.

Having regard to these figures, it does not follow that

1*l.* 18*s.* 2*d.* is the right sum, and in discharging the order we are not affirming that it is the right sum. What has to be ascertained under the order of the Court is simply this. The owner rateable under the Act of 1867 is not entitled to abatement or deduction under the Act of 1869. Whether he has been rated in respect of a proper figure and whether 1*l.* 18*s.* 2*d.* is an amount improperly allowed are questions upon which we have not materials for forming an opinion. It seems to me, therefore, that the order which was made yesterday should not allow the surcharge of 1*l.* 18*s.* 2*d.* mentioning that figure or any surcharge of defined amount, but should simply declare, according to our decision of yesterday, that the owner is not entitled to an abatement or deduction under the Act of 1869 and leave the amount of surcharge open.

The matter which we have heard to-day is this. There was one room on the top floor of this house which was entered in the rate-book as assessed upon the owner under the Act of 1869. The amount of the rate was 1*l.* 1*s.* 3*d.* There was an amount allowed under the Act of 1869 in respect of that of 1*s.* 4*d.* The amount which Mr. Roberts seeks to surcharge is a sum of 10*s.* 8*d.*, being a moiety of 1*l.* 1*s.* 3*d.* We have no material for determining whether that is right or wrong. This 10*s.* 8*d.* has nothing to do with what we decided yesterday. It is not an abatement allowed off a rate which some one is paying. The room is treated as an unoccupied room, and the 10*s.* 8*d.* is the rate in respect of the period during which his room was unoccupied. The borough council said, "Inasmuch as it is an unoccupied rateable hereditament, the rate is not payable," and they have not collected it. To question that is to find fault with the assessment. It is finding fault with the rate-book, which attributes a certain value to this separate room in a house being, according to our decision of yesterday, a hereditament that was not rateable at all. What was rateable was the whole house including that room; and the rateable value attributed to that room and the consequential rate were a rateable value and a rate which, upon the footing of that decision, ought not to have been arrived at at all. The fact is that neither before the Divisional Court nor before us are there any materials for the purpose of

C. A. 1913

REX v. ROBERTS.

Buckle L. .

enabling us to say whether or not, upon a valuation properly made and passed by the assessment committee in due form under the Acts of Parliament, there ought to have been attributed to this house as an entirety some figure which would have included that 10*s.* 8*d.* or some part of that 10*s.* 8*d.* The valuation of the house as a whole might have been a totally different thing from the aggregate of the valuations of three parts of the same house, and that is, as it seems to me, the question which emerges for the purpose of determining whether the borough council ought to have collected, I will not say this 10*s.* 8*d.*, but some larger sum than they have collected, upon the footing that this unoccupied room was in a house which ought to have been rated as a whole. The facts stated before us this morning do not raise the question. The facts supplied to us this morning state this: "In collecting the general rate, made on the 1st October, 1910, which was for the half-year ending on the 31st March, 1911, the owner of the house was rated and assessed to such rate under s. 4 of the Act of 1869." That is the thing we have held to be wrong. To give effect to the order of the Court, it will be necessary to put that right. But this wrong assessment must be put right, not by any person who is before us, nor in these proceedings by way of certiorari. It must be put right at the instance of the parties who are competent to appeal against the assessment as made by the assessment committee and get the assessment put right. It is a matter which cannot be entertained upon certiorari. It is not within the matter which the Divisional Court have heard or which we are hearing.

I think, therefore, that we ought to discharge the whole of the order of the Divisional Court, substituting, if my brothers agree, a declaration to the effect of what we determined yesterday, and expressly stating that, as regards this surcharge of 10*s.* 8*d.*, although we are reversing the decision of the Divisional Court which quashed the surcharge, we do not affirm that the surcharge was right, but simply determine nothing at all about whether such surcharge or some other surcharge could or could not be made in respect of that matter. That can be raised hereafter in a proper proceeding. I have sketched the

form of order. The Lords Justices will consider whether it is right, and Vaughan Williams L.J. will state presently what it is.

HAMILTON L.J. I agree. It is clear that until this morning no Court has had anything that could be called sufficient materials before it upon which to deal with the question which arises on this unoccupied top floor room. The Divisional Court did not so much as discuss the question, because the decision at which it felt itself constrained to arrive made this question immaterial. When we came to discuss the question yesterday it appeared that although Mr. Roberts on one side and Mr. Sylvain Mayer on the other were, as one would expect, very largely in agreement as to what the facts were, the materials were not in such shape as to make it convenient for us to appreciate them, unless they were put into writing. Only this morning we have, and a Court for the first time in this matter has, the actual facts.

Our decision yesterday was arrived at upon the footing upon which the case had been presented to us, which did not include any consideration of the actual terms of the quinquennial valuation list or the provisional valuation list. I agree therefore in what has been said as to the form in which our decision of yesterday should be expressed by our order.

With regard to the question raised to-day, it is, I regret, impracticable for us to come to any decision upon the question of this unoccupied room, because, on examining the facts, I think it is now clear that Mr. Roberts' surcharge is based upon the assumption that he can surcharge the borough council in respect of its failure to collect a particular sum, not because the sum was there and had only to be asked for and it would have been paid, but because they failed to challenge a provisional valuation list which was regular in form and had been arrived at by a proper and competent authority. I say nothing as to what proceedings would be proper for challenging that provisional valuation list except that it is not this proceeding.

Accordingly it is impossible for us, with propriety, to express any opinion upon this interesting question of the top floor room at No. 19, Rush Hill Road. I have a good deal of regret for this

C. A. 1913

REX v. ROBERTS.

Hamilton L.J.

result because I quite appreciate that Mr. Roberts and the department to which he belongs—and we are indebted to Mr. Roberts for his very clear and frank way of putting the case before us—may very possibly feel that a good deal has been done in the hope of getting a decision and the hopes are disappointed at the last moment. But it is essential for those who bring this class of cases before us, just because the statutes on this class of questions are intricate, to bear in mind what is a fixed and immutable rule that governs every Court of justice—that we can only sit here and deal with questions which do arise in fact, and that are presented to us on facts or admissions of facts so as to make them real questions, and are, unfortunately it may be, unable to express opinions upon questions which might arise in shapes which are hypothetical, which are called "test questions."

I agree therefore in the result, that the appeal, so far as it has been argued, succeeds, but that the order of the Court should take the form which my brethren have expressed.

VAUGHAN WILLIAMS L.J. The order of the Court will be—Discharge the order of the Divisional Court, and declare that the borough of Battersea is within the words "all boroughs" in s. 7 of the Act of 1867 and that in the borough of Battersea the owner rated by virtue of s. 7 of that Act is not entitled to abatement or deduction under the Act of 1869, and that in respect of the question raised this morning with regard to the unoccupied room in the house 19, Rush Hill Road, we discharge so much of the order of the Divisional Court as deals with this subject-matter on the ground that there were not before the Divisional Court or before us any materials enabling the Court to deal with the question raised, and expressly declare that this discharge of this order is without prejudice to the right to raise this very question with regard to this very room hereafter.

Appeal allowed.

Solicitors for appellant: *Last, Sons & Fitton.*
Solicitor for respondents: *P. Caudwell.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1913
Oct. 24, 27, 28; *Nov.* 24.

MONCKTON *v.* PATHÉ FRÈRES PATHEPHONE, LIMITED.

[1912 M. 2189.]

Copyright—Musical Work—Gramophone Records—Records made before Commencement of Act—Sale after Commencement—Infringement—Royalties—Board of Trade Regulations for "securing the payment of royalties"—Affixing adhesive Label to Record—Validity—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 19, 24.

Sect. 1, sub-s. 2 (*d*), of the Copyright Act, 1911, for the first time gives the author of a literary, dramatic, or musical work the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.

The plaintiff in the early part of 1911 composed and published an original musical work. Before the commencement of the Copyright Act, 1911 (July 1, 1912), the defendants manufactured abroad and imported into England gramophone records of the plaintiff's musical work, and after the commencement of the Act they sold these records without the plaintiff's consent and without payment of royalties:—

Held, that the defendants had thereby infringed the plaintiff's copyright in his musical work.

By s. 19, sub-s. 6, of the Act, the Board of Trade may make regulations prescribing "the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties."

The Board of Trade made a regulation that, unless otherwise agreed, the royalty should be payable by means of an adhesive label purchased from the owner of the copyright and denoting the amount of the royalty, the label to be affixed to the record before delivery to a purchaser:—

Held, that this regulation was intra vires as being one for "securing," that is to say ensuring, the payment of royalties.

Appeal from the judgment of Phillimore J. in an action tried without a jury.

The plaintiff in 1911, before the passing of the Copyright Act, 1911, composed and published a musical work called the "Mousmé Waltz." The defendants, who were manufacturers and retailers of gramophone records, before the commencement of the Act (July 1, 1912) made in Belgium records of the plaintiff's

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHEPHONE, LIMITED.

musical work, and imported them into this country. After the commencement of the Act the defendants sold the records, so made and imported, without the plaintiff's consent and without paying royalties thereon. The writ in the action was issued on August 30, 1912. The plaintiff in his statement of claim alleged that the defendants had infringed his copyright in the "Mousmé Waltz" by selling the said records without his consent, and he claimed an injunction to restrain the defendants from making, selling, letting for hire, or offering for sale or hire, or importing for sale or hire, any gramophone records of or other contrivance for the purpose of mechanically reproducing the plaintiff's musical work the "Mousmé Waltz" or any part thereof without the plaintiff's consent; and an account of all sums received by or on account of the defendants from the sale or other dealing with any records infringing the plaintiff's musical work.

The Board of Trade, under s. 19, sub-s. 6, of the Act (1), made regulations, entitled "The Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912" (2), for the payment of royalties, the material clause of which is as follows :—

"(4.)—(*a*) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed in the manner provided by these regulations.

"After the person making the contrivances has given the prescribed notice of his intention to make or sell the contrivances, the owner of the copyright shall by writing sent by registered post intimate to him some reasonably convenient place within the United Kingdom from which adhesive labels can be obtained, and on demand in writing and tender of the price shall supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby.

"Subject to these regulations no contrivance shall be delivered

(1) Copyright Act, 1911, s. 19, sub-s. 6: "For the purposes of this section, the Board of Trade may make regulations prescribing . . . . the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit include regulations requiring payment in advance or otherwise securing the payment of royalties."

(2) The regulations are set out in the Statutory Rules and Orders, 1912, p. 38, under the heading of "Copyright," No. 533.

to a purchaser until such label or labels denoting the amount of royalty have been affixed thereto, or in the case of cylinders, to which it is not reasonably practicable to affix the labels, until such label or labels have been affixed to a carton or box enclosing the cylinder."

The regulation then prescribed the form and size of the labels and as to what was to be done in case labels were not available.

The defendants in their statement of defence denied that they had infringed the plaintiff's copyright in the "Mousmé Waltz"; and they said further that, if the plaintiff relied upon the above regulations of the Board of Trade, such regulations, so far as they prescribed the mode in which or the conditions subject to which the defendants might sell or deliver records to their customers, were ultra vires and of no force or effect.

Phillimore J. held that the defendants were entitled without the plaintiff's consent and without payment of royalties under the Copyright Act, 1911, to make before July 1, 1912, the date of the commencement of the Act, records of the "Mousmé Waltz," and to sell after that date the records so made. He accordingly gave judgment for the defendants upon the claim. He also made a declaration (as the parties desired to have his decision on the point, though in view of his decision upon the other question it did not become necessary to decide it) that the defendants were bound to purchase and affix labels in accordance with the regulations of the Board of Trade under s. 19 of the Copyright Act, 1911, in respect of all records sold by the defendants for which they were liable to pay royalties to the plaintiff, and that such regulations were valid and binding. (1)

(1) The learned judge in this part of his judgment dealing with the regulations of the Board of Trade said that though it might be very inconvenient to have to affix a label to each of the discs, yet on the other hand it would be extremely difficult in any other manner to ensure the collection of these small royalties on large numbers of cheap instruments. As to the objection that the Board of Trade could not order payment by the purchase of labels, it seemed to him to be a mode of payment. As to the objection that the Board of Trade could not order the affixing of the label to the record, if it was competent to prescribe that the payment should be made by purchasing adhesive labels, then it was competent to prescribe that the labels should not do duty more than once, and for that purpose that they should be cancelled; and it was

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

The plaintiff appealed, and the defendants gave notice that they would contend that the declaration made by the learned judge was wrong.

Montague Shearman, K.C., and *Hon. S. O. Henn Collins*, for the plaintiff. Sect. 1, sub-s. 2 (*d*), of the Copyright Act, 1911, confers for the first time upon the author of a literary, dramatic, or musical work the sole right "to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered." The plaintiff had acquired copyright in the "Mousmé Waltz" when he published it in 1911 before the Copyright Act, 1911, came into operation, and therefore he has, since the Act came into operation, the rights conferred upon him by s. 24 and Sched. I. of the Act, namely, "copyright as defined by this Act." The question is whether the plaintiff has the right to restrain the sale since the commencement of the Act of mechanical records, which are reproductions of his copyright musical work and which were made before the commencement of the Act. The scheme of the Act as regards mechanical contrivances reproducing musical works seems to be this. In the case of musical works published before the commencement of the Act, if the contrivances had been lawfully made or placed on sale before July 1, 1910, no royalties shall be payable before July 1, 1913, and after that date at the reduced rate of $2\frac{1}{2}$ per cent.; in all other cases royalties are payable at the reduced rate of $2\frac{1}{2}$ per cent. as from the commencement of the Act: s. 19, sub-s. 7 (*b*). In the case of musical works published after the commencement of the Act the author has full control over the copyright, and has the sole right, subject to s. 19, sub-s. 2, to make any record or other contrivance for the reproduction thereof: s. 1, sub-s. 2 (*d*); but by s. 24, sub-s. 1 (*b*), if any person has before July 26, 1910, taken any action whereby he has incurred any expense in connection with the reproduction or performance of a work in a manner which at the time was lawful, nothing in that section shall diminish or prejudice any rights or interest arising from such

---

therefore within the power of the Board of Trade to prescribe that the labels should be affixed instead of cancelled.

action, unless the owner of the copyright compensates him. Moreover, by s. 19, sub-s. 7 (*a*), in the case of musical works published before the commencement of the Act, it is not an infringement of the author's copyright merely to "make" records or other contrivances, if the maker complies with the condition as to giving notice in sub-s. 2 (*b*). Sect. 2 defines infringement of copyright, and by sub-s. 2 copyright is infringed by any person who "sells any work which to his knowledge infringes copyright." Sect. 19, sub-ss. 2 and 7, contemplate that records, which are not infringements when made, will become so on sale if royalties are not paid, the former sub-section providing that "it shall not be deemed to be an infringement of copyright in any musical work for any person to make . . . . records" if such person proves (*b*) that he has given the prescribed notice and "has paid" to the owner of the copyright "royalties in respect of all such contrivances sold by him." Therefore for the purposes of s. 19 sale and not making is the test as to whether a record infringes copyright, and, applying that to s. 2, sub-s. 2, an infringement is committed by selling a record which to the seller's knowledge is sold otherwise than in conformity with s. 19: see sub-s. 7 (*d*). The sale of these records by the defendants after the commencement of the Act without payment of royalties was an infringement of the plaintiff's copyright. The defendants must be taken to know the provisions of the Act, and as they had knowledge of all material facts the sale of these records after the commencement of the Act was a sale of a work which to their knowledge infringed the plaintiff's copyright within the meaning of s. 2, sub-s. 2. The plaintiff had the sole right after the commencement of the Act to sell records of the "Mousmé Waltz," and the right to be paid royalties in respect of these records is given either expressly or by necessary implication in the sections of the Act. The judgment of Phillimore J. upon this point was therefore wrong. No question is sought to be raised by either of the parties upon s. 19, sub-s. 1, which confers copyright in records, perforated rolls, and other contrivances.

J. Sankey, K.C., and *H. A. McCardie*, for the defendants. There is nothing in the Copyright Act, 1911, which confers upon the owner of the copyright in a musical work the right to claim

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

royalties in respect of records lawfully made before the date when the Act came into operation and sold after that date, or to claim an injunction to restrain the sale of those records after that date. The saving referred to in s. 19, sub-s. 7 (*d*), is that contained in s. 24, sub-s. 1 (*b*), and not s. 19, sub-s. 7 (*b*). They both refer to "action taken," and therefore s. 19, sub-s. 7 (*d*), refers to action taken before July 26, 1910, and it cannot be inferred from it that to sell after the commencement of the Act a record lawfully made before the commencement of the Act is an infringement of copyright. That provision therefore does not affect the case. The defendants had a right to make these records at the time when they made them, and having that right there must be found in the Act some express words depriving them of their right to sell these records without paying royalties. The only possible provision which can be referred to as giving a right to royalties is s. 19, sub-s. 7 (*d*), and that refers, as already stated, to a saving clause in s. 24 which does not affect the defendants, and the case is not within s. 19, sub-s. 7 (*b*). There is no express legislation dealing with the case. The defendants had on June 30, 1912, the day before the Act came into operation, a vested right to sell the records, and the Act has not either in express terms or by necessary implication taken away that right. "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. . . . . It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication": Maxwell on the Interpretation of Statutes, 5th ed. p. 348. The retrospective operation of the Act which the plaintiff seeks to establish is to make the defendants pay royalties on records which they had a right to manufacture and which they had in stock for the purpose of sale at the time when the Act came into operation. The judgment was therefore right.

With regard to the cross-appeal, assuming that the defendants have to pay royalties, the Board of Trade regulations requiring them to purchase and affix adhesive labels to the records are ultra

vires. The question is an important one because these records are sold in large quantities, and it would be oppressive, if not practically impossible, to affix a label to each record. The power given by s. 19, sub-s. 6, of the Act to make regulations prescribing "the mode, time, and frequency of the payment of royalties" does not authorize a regulation prescribing the affixing of labels on the records. "Payment" there means payment in the ordinary manner by handing over money or a cheque. It is an act to be done by the maker of the records. The label is a receipt for the payment and there is nothing in the Act authorizing the making of a regulation for giving a receipt. Sub-s. 2 (*b*) speaks of the maker of the records having "paid in the prescribed manner" royalties to the owner of the copyright, meaning payment in the ordinary way. There is no power to make regulations compelling the maker of the records, first, to purchase adhesive labels from the owner of the copyright, and, secondly, to affix those labels to the records. The regulations say that after the maker of the record has paid the amount of the royalty to the owner of the copyright the latter shall do another act, namely, hand over a label, and that the maker of the record shall do a further act, namely, affix the label to the record. The last words of the sub-section, "or otherwise securing the payment of royalties," do not carry the matter further. "Payment" being the satisfaction of an obligation, "securing" that payment means giving security for the satisfaction of that obligation. That may be accomplished by depositing a sum of money or in some such manner. It must be something similar to the preceding words, "requiring payment in advance." The label is really a receipt for the money which the maker of the record has to hand over to the purchaser of the record. A receipt is not a security. The payment has already been made when the label is given. Under s. 7 (*a*) of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), express statutory power was given to the Insurance Commissioners to make regulations providing for payment of contributions by means of adhesive or other stamps. There is no such power given by the Copyright Act, 1911, and the regulations are therefore ultra vires.

Montague Shearman, *K.C.*, in reply. With regard to the cross-

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

appeal, the Court ought to give a business meaning to s. 19, sub-s. 6. Under the power to make regulations for "securing the payment of royalties" the Board of Trade have power to make the regulation in question. These records are made in very large numbers, and they are not distinguishable from one another. Unless, therefore, there is something affixed to the record it will be impossible to tell how many records any particular person sells, and the protection given by the Act to the owner of the copyright will be gone. Moreover, by s. 19, sub-s. 2, where records have once been made by a person with the consent of the owner of the copyright in the musical work, any other person can, on giving the prescribed notice and on payment of royalties to or for the benefit of the owner of the copyright in the work, make records of the work. Unless a label is affixed to each record sold there will be no means by which the owner of the copyright will be able to collect the royalties. The section gives power to the Board of Trade to prescribe regulations securing, that is to say making certain, the payment of royalties. "Securing" does not mean giving a security for the payment.

Cur. adv. vult.

Nov. 24. VAUGHAN WILLIAMS L.J. In this case I have had the advantage of reading the judgments of Buckley L.J. and Kennedy L.J., and I entirely agree with them.

BUCKLEY L.J. read the following judgment:— There are here three points of time which it is necessary to bear in mind. First, a date in 1910, which appears as July 1 in s. 19, sub-s. 7 (*b*), of the Act and as July 26 in s. 24, sub-s. 1 (*b*). Why this variance exists I do not know. Secondly, the date of the passing of the Act, namely, December 16, 1911; and thirdly, the date of the commencement of the Act, namely, July 1, 1912 (see s. 37). The plaintiff is a person who in 1911, that is to say, after the first of these dates and before the second, composed a certain musical work. The defendants are persons who after the second and before the third of these dates made, as they were lawfully entitled to make, records of the plaintiff's musical work, being what the Act includes under the expression

"mechanical contrivances." They made these in Belgium. They imported them into this country at a date which has been assumed to be before the third of these dates. The question is whether the defendants are now, after the commencement of the Act, entitled to sell them in this country without paying royalty.

On July 1, 1912, when the Act came into force, the plaintiff was a person entitled to the musical copyright in his musical work, and he then became, by virtue of s. 24, sub-s. 1, and the First Schedule to the Act, entitled to copyright in his work "as defined by this Act." Such copyright included, by virtue of s. 1, sub-s. 2, the right to reproduce the work in any material form (including therefore such a record as is here in question), and included the sole right to make any such record: s. 1, sub-s. 2 (*d*). It will be noticed that making and not sale is the thing to which, by virtue of that section, the sole right is so far given to the plaintiff. This right the defendants have not infringed. But further, under s. 1, sub-s. 2, copyright includes the sole right to authorize the performance of the work. The seller of a record authorizes, I conceive, the use of the record, and such user will be a performance of the musical work. This consideration seems to shew that sub-s. 2 itself is not confined to making but extends to sale. These rights in the plaintiff were qualified by s. 24, sub-s. 1 (*b*), and s. 19, sub-s. 2. But inasmuch as the musical work in question was one published before the commencement of the Act, the provisions of s. 19, sub-s. 2, are qualified by the provisions of s. 19, sub-s. 7 (*a*), (*b*), and (if it be applicable) by the provisions of s. 19, sub-s. 7 (*d*). It will be noticed that in the section to which I have last referred sale as distinguished from making is mentioned in s. 19, sub-ss. 2 (*b*) and 3, and also in s. 19, sub-s. 7 (*d*), and importation is mentioned in s. 11, sub-s. 1 (*e*).

From these difficult and complicated provisions I evolve the following. Sect. 19, sub-s. 2, applies to any musical work, whether composed before or after the commencement of the Act, but the provisions of that clause are in the case of the work with which I have to do modified and controlled by s. 19, sub-s. 7, which relates to musical works published before the commencement

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHEPHONE, LIMITED.

Buckley L.J.

of the Act. The result so far is that to this musical work the provisions in s. 19, sub-s. 2 (*a*), and the first proviso in that sub-section do not apply, but the provisions in (*b*) do apply. There is an exception in sub-s. 7 (*b*), namely, that royalties are not to be payable in a certain case. The case is that in which contrivances reproducing the work have been lawfully made or placed on sale before July 1, 1910. If this has been done by any one, then no one is to pay royalties for such contrivances if he sells them before July 1, 1913. It seems to me to follow that if that condition is not satisfied, then royalties are to be payable, and such royalties will commence from the commencement of the Act. There are but two alternatives in the case, and they are these: either (*a*) that royalties are payable as from the commencement of the Act, or (*b*) that no royalty is payable for all time. If the latter alternative be accepted there is created in the special case of making or placing on sale before July 1, 1910, a limited right to sell free of royalties, but in the case not covered by the contingency an unqualified right to sell free of royalties. This is not probable. Further light is thrown upon the question by sub-s. 7 (*d*). That is a sub-section which proceeds upon the footing that to justify a sale of contrivances, whether made before or after the passing of the Act, an authority is necessary. It is a sub-section applicable to the case of a musical work published before the commencement of the Act. It infers that in such a case there must be something in the Act which forbids the sale of contrivances made before the passing of the Act in the absence of an authorization so to do. The particular saving mentioned in sub-s. 7 (*d*) is, I think, that referred to in s. 24, sub-s. 1 (*b*). The case there contemplated is that not of making or placing on sale before July 1, 1910, mentioned in s. 19, sub-s. 7 (*b*), but of action taken before July 26, 1910, and it provides that in that case the person who has so taken action shall retain unaffected, so far as that section is concerned, any rights which he had at that date unless he is paid compensation. Such a one may go on unaffected by the new copyright and enjoy the benefit of all rights or interest arising from or in connection with such action which are subsisting and valuable at that date, unless the new copyright owner compensates him for being deprived of the

right so to do. Inferentially, therefore, a person who has not taken such action before that date cannot go on upon the footing that his rights are unaffected. The respondents have argued that at the date of the commencement of the Act they possessed records which were their property lawfully made, that they could sell them, and that there was nothing to take away their right to sell them. The contention is, I think, not well founded. Subject to the exceptions provided by s. 19, sub-s. 7 (*b*), or by s. 24, sub-s. 1 (*b*), it seems to me that the Act has given to the owner of the new and extended copyright as defined by the Act the sole right to authorize any one to produce the musical work (e.g., by the user of the record: s. 1, sub-s. 2), and has made it an infringement of his rights that a person should sell a record which to the knowledge of the seller infringes the sole right of the composer to produce the work by the use of the record: s. 2, sub-s. 2. The defendants in the present case are not within the exceptions which I have mentioned, and as from the commencement of the Act any sale by them was in my judgment (*a*) an infringement, and (*b*) a case in which royalties became payable.

There is another most difficult question, and that is that by virtue of s. 19, sub-s. 1, the defendants themselves have a copyright in their records—as if such contrivances were musical works—with a term of copyright different from that of the composer and being fifty years from the making of the original plate. In respect of this copyright it would seem that they have the exclusive rights of s. 1, sub-s. 2. The parties, however, have declined to argue this question as having any bearing upon the present case, and I, therefore, say no more about it.

Upon the cross-appeal the question turns upon the meaning of the word "securing" in s. 19, sub-s. 6. It is a section by which the Board of Trade may make regulations "requiring payment in advance or otherwise securing the payment of royalties." If that word "securing" means doing some act by which the debt for royalties shall become a secured as distinguished from an unsecured debt, the cross-appellants are right, but if it means ensuring or rendering certain, then they are wrong. The Board of Trade have made regulations whereby, unless otherwise agreed, royalties are to be payable by means of

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

Buckley L.J.

adhesive labels purchased from the owner of the copyright and affixed to the goods. If the copyright owner will not provide the labels the manufacturer of the records may proceed without affixing them, but in default of agreement to the contrary the manufacturer must, if the copyright owner provides the labels, buy them and affix them. The defendants contend, and I agree, that regulations in this respect are not within the words "the mode of the payment of royalties." Payment is one act, supplying labels is a second, and affixing them is a third. Neither of the last two is any part of the mode of doing the first. But are regulations as to this matter regulations for securing the payment of royalties? I think they are, if "securing" means "ensuring." The royalties here in question are of very small amounts paid upon, it may be, a vast number of goods. There is obviously great difficulty in ensuring that the debt created by the sale of a record shall become known to, and its payment ensured to, the copyright owner. Under these circumstances I think that the fair meaning of the word "securing" in this context includes the meaning of ensuring or rendering certain the payment of royalties. If this be so, as I think it is, the regulations which the Board of Trade have made are not ultra vires, and this is my opinion.

It results that the appeal succeeds and the cross-appeal fails.

KENNEDY L.J. read the following judgment:—The Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), was passed on December 16, 1911, and came into operation on July 1, 1912. The plaintiff in this action in the early part of the year 1911 composed and published an original musical work called the "Mousmé Waltz." At some date or dates in the same year, or, at all events, at some time before the Act came into operation, the defendants, who are manufacturers and sellers of gramophone records, manufactured abroad and imported into England gramophone records of the "Mousmé Waltz"; and they have sold such records in England since July 1, 1912, without the plaintiff's consent and without paying him any royalty.

It is in respect of these sales that the plaintiff has brought the present action. He founds his claim upon the Copyright Act,

1911, asking for an injunction to restrain the defendants from making, selling, letting for hire or offering for sale or hire, or importing for sale or hire any such gramophone records without his consent; an account of moneys received by the defendants from sales or other dealings since the passing of the Act; and other relief as it is set forth in the statement of claim. In substance the issue to be decided is whether the defendants were or were not legally entitled, without authority from the plaintiff and without liability to pay royalty, to sell after July 1, 1912, when the Copyright Act came into operation, records made by them before that date. Phillimore J. (now Phillimore L.J.) has given judgment for the defendants upon this issue, and the present appeal is the appeal of the plaintiff against that decision.

Sects. 1 and 2 of the Act declare what the copyright is which the Act—speaking, of course, from the date of its coming into operation—decrees to subsist in (inter alia) every original musical work, and what is to be deemed to be an infringement of that copyright. Looking only to so much of those two sections as is relevant to the present case, we find the following provisions. "Copyright" means the sole right to produce or reproduce the musical work or any substantial part thereof in any material form whatsoever, and includes the sole right, in the case of a musical work, to make any record, perforated roll, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorize any such acts. Copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by this Act conferred on the owner of the copyright, subject to certain particular exceptions which do not touch this case; and copyright shall also be deemed to be infringed by any person who (*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or (*d*) imports for sale or hire into any part of His Majesty's dominions to which the Act extends any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire took place.

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

Kennedy L.J.

I shall have to refer, later on, to some of the provisions of s. 19 of the Act, the effect of which is under certain conditions and in particular circumstances to license or permit the making and the sale of reproductions of a copyright musical work which would otherwise constitute infringements. But on ss. 1 and 2, which I have cited in an abbreviated form so far as they affect the present case, it is, in my judgment, plain that by selling after July 1, 1912, when this Act came into operation, without the plaintiff's consent, records which were mechanical reproductions of his original musical work, the "Mousmé Waltz," the defendants did on the occasion of each sale commit an act which brought them according to the express terms of s. 2 within the category of persons to be deemed to be infringers of the plaintiff's copyright. There is not any dispute as to the circumstances. The defendants do not allege—indeed they could not be heard to allege—that they did not know this Act of Parliament; and, if they knew it, they knew that, by s. 37, sub-s. 2, it came into operation at the latest on July 1, 1912; that under it the plaintiff had, as the author and therefore (s. 5, sub-s. 1) the owner of the "copyright" in his original musical work, the sole right of producing or reproducing it by means of a record; and that by selling, as they have done, in this country, without his consent, after July 1, 1912, the records which reproduced the copyright work, they were according to the express provisions of s. 2 to be deemed to be infringers of the plaintiff's copyright.

The basis of my brother Phillimore's judgment in favour of the defendants, and the same theme naturally formed the staple of the argument of their counsel in this Court, is a proposition, or perhaps I should rather say an assumption, of law in the correctness of which I am unable to concur. It is, to put it shortly, that you are bound to imply, in regard to records made before the statute came into operation, an exemption from the operation of the statute enabling persons in the position of the defendants after the statute came into operation to sell such records without thereby incurring any liability as infringers. The passage in the judgment is as follows: "Well, I confess, if there are no other sections in the way"—my brother

Phillimore is here referring to ss. 1 and 2—"it seems to me reasonably plain that the copyright, meaning by that the right to make or authorize the making of records, does not arise till after July 1, 1912, and that up to July 1, 1912, anybody might make records so far, just as they might before the Act was passed, without infringing any copyright given by the Act"—I pause to say that I agree—"and that records lawfully made before the commencement of the Act may lawfully be sold after the commencement of the Act." Counsel for the defendants, adopting this view, endeavoured to support it by a reference to the general rule of interpretation that an Act of Parliament should not, unless its language clearly required it, be construed or applied so as to have a retrospective operation. Of the existence of that general canon of interpretation there can be no question, but there is no room for its discussion in the present case; no one is seeking to give the Act a retrospective operation. The Act itself, by s. 37, sub-s. 2, fixes (subject to the possibility of an earlier date being fixed by Order in Council) a future date, July 1, 1912, for the commencement of its operation. Under s. 2, as I have pointed out, making an infringing article and selling with knowledge an infringing article constitute distinct breaches of the Act; the acts are separate acts, and the infringer by manufacture and the infringer by sale may be different persons. The plaintiff is not seeking in the present case to give the Act any retrospective operation; he makes no complaint, and could make no complaint, as to either manufactures or sales of the records before July 1, 1912. What he does say is: On July 1, 1912, the Act gave me a copyright, and by s. 2 made the sale after that date, without my consent, of an article which, to the seller's knowledge, infringed the copyright which the Act gave me an actionable wrong, and the defendants did so sell. It appears to me to be a fallacy to speak of an Act of Parliament as retrospective which forbids or punishes only the doing of a particular act in the future; although, of course, the prohibition may entail some pecuniary or other disadvantage to a person who has made plans or incurred expenditure in the belief or the hope that there will be no such legislation and therefore that

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

Kennedy L.J.

the act, now forbidden in the future, will continue to be permissible. It is for Parliament, when it passes the law, to consider the case of possible or probable incidents of hardship flowing from the operation of the law; and in fact in the present case, in s. 19, Parliament has legislated for the only cases in which it conceived that any real hardship of the sort to which I have just referred could arise. But I am at a loss to conceive upon what principle one would be entitled to read into this Copyright Act by mere implication a permission, after the Act came into operation, to violate s. 2 in regard to the sale of infringing articles provided only that they were made before that date. Suppose an Act of Parliament passed simply forbidding from a certain future date the sale to a civilian of pistols except with an official permit. Could it reasonably be contended that by necessary implication the statute must be interpreted as not applying to any pistols already manufactured?

If we turn to later sections of the Act we find in s. 19, and to a less extent in s. 24, enactments which inferentially lend considerable support to the plaintiff's case, because they shew that the framers of the Act have considered and provided specially for those cases in which it could justly be thought that otherwise a hardship might be occasioned by the grant of the copyright to become enforceable on the date at which the Act should come into operation, and none of these provisions avail the defendants in their defence to the present action.

Sect. 19, after enacting in sub-s. 2 that it shall not be deemed to be an infringement of copyright in any musical work to make records, perforated rolls, or similar mechanical contrivances by which the work may be mechanically performed if the owner of the copyright has previously consented to or acquiesced in the making of such contrivances, and the reproducer has given notice of his intention to make them and pays the owner of the copyright royalties at the rate which the same section proceeds to prescribe, and after making certain other provisions which do not affect the present case, proceeds in sub-s. 7 to enact in regard to musical works published before the date of the commencement of the Act (i.e., July 1, 1912) the following modifications (I am not quoting in extenso): (1.) The conditions as to the

previous making by or with the consent or acquiescence of the owner of the copyright and certain restrictions as to alterations in or omissions from the work, which had been enacted in an earlier portion of the same section, shall not apply; (2.) the rate at which royalties are to be calculated shall be 2½ instead of 5 per cent.; (3.) in respect of contrivances sold before July 1, 1913, no royalties shall be payable if contrivances reproducing the same work have been lawfully made or placed on sale before July 1, 1910.

The meaning and the reason of these provisions are alike clear. It was felt that some allowance in favour of the reproducer might fairly be made in regard to musical works published, like the "Mousmé Waltz," before the commencement of the Act, and these provisions effect that allowance. The reproducer in any case will have to pay only half the ordinary royalty; and further, if reproductions of such musical works have been lawfully made or placed on sale as far back as July 1, 1910, then for a whole year after the Act comes into operation, unless an earlier date is fixed by Order in Council (i.e., from July 1, 1912, until July 1, 1913), the sale of such contrivances shall be exempt from the payment of any royalties.

It is, as it appears to me, a just inference from the grant of these special modifications in regard to the rights of the owners of copyright in musical works which were published before July 1, 1912, and from a further modification, to which I shall again presently refer, contained in s. 24, sub-s. 1 (*b*), that the framers of the Act cannot properly be held to have impliedly granted in favour of all mechanical reproductions of such musical works, if made before July 1, 1912, the right of sale after the commencement of the Act without the consent of the owner of the copyright and without payment of royalty, which the defendants assert in this action.

Then comes an important enactment, sub-s. 7 (*d*) of the same s. 19: "The saving contained in this Act of the rights and interests arising from or in connection with action taken before the commencement of this Act shall not be construed as authorising any person, who has made contrivances by means of which the work may be mechanically performed, to sell

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

Kennedy L.J.

any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section." In the course of the argument in this Court there was a good deal of discussion about this sub-section. Counsel for the defendants contended that, although it is a sub-section of s. 19, and almost immediately follows sub-ss. 7 (*a*) and (*b*), the purport of which I have just summarized, it refers only to a much later portion of the Act, namely, s. 24, sub-s. 1 (*b*), which reserves, in default of compensation by the person entitled to restrain reproduction or performance, to any one who has before July 26, 1910, taken any action whereby he has incurred any expenditure or liability in connection with a then lawful reproduction or performance of a work, any rights or interest arising from or in connection with such action which are subsisting and valuable. Having regard to the use in both s. 19, sub-s. 7 (*d*), and in s. 24, sub-s. 1 (*b*), of the words "rights and interests arising from or in connection with action taken before," I am inclined to think, in spite of the difference of the dates mentioned—"the commencement of this Act" (i.e., July 1, 1912), in the earlier and "the 26th day of July, 1910," in the later section—and in spite of the relative collocation of the two provisions, that the provision in question ought to be treated as extending to s. 24, sub-s. 1 (*b*). But I also think that, having regard to its collocation as a part of s. 19 and its reference to "the commencement of this Act," we ought to regard it as also referring to the almost immediately preceding enactments of sub-s. 7 (*a*) and (*b*) of the same section. The protection afforded by those preceding sub-sections of s. 19 to the interests of reproducers of musical works published before the commencement of the Act, who are to pay only half of the standard royalty, and further, if there has been a lawful making or placing on sale of such reproductions before July 1, 1910, the grant of a right for twelve months after the commencement of the Act to sell without payment of any royalty, may, it seems to me, reasonably be treated as a "saving of the rights and interests arising from or in connection with action taken before the commencement of this Act." But, be this as it may, the important words in s. 19, sub-s. 7 (*d*), are "contrivances, whether made before or after the

passing of this Act." They appear to me to create a very strong inference indeed, if inference be needed, of the unsoundness of the defendants' contention that this Act ought to be read as permitting, after it came into operation, sales of reproductions of musical works which would otherwise constitute infringements of copyright under s. 2, provided only that the reproductions were made before the Act came into operation. The learned judge in the Court below recognized the force of the argument for the plaintiff arising from the language "whether made before or after the passing of this Act." He has expressly said so in his judgment. He did not give any effect to it, because he felt himself entitled to hold that the expression was not quite accurate and to reject the whole line as surplusage. With sincere respect I confess myself unable to find any sufficient justification for this method of interpreting the statute, and I will only add that, if the words "whether made before or after the passing of this Act" can be treated as surplusage, they can only be so treated if, as I think, and contrary to the defendants' contention, it is held that, according to the true construction of the Act and apart from these words, the sale after its commencement, which would otherwise constitute an infringement of copyright under s. 2, is none the less an infringement because the articles sold were made before the passing of the Act.

In my judgment the appeal of the plaintiff ought to be allowed.

There remains to be considered the cross-appeal of the defendants against so much of the judgment in the Court below as affirms the validity of the regulations made by the Board of Trade under s. 19, sub-s. 6, of this Act. By the terms of that section the Board of Trade may prescribe by regulations (inter alia) "the mode, time and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties." The Board of Trade have made regulations prescribing that, unless it is otherwise agreed, royalties shall be payable by adhesive labels purchased from the owner of the copyright and affixed in a certain prescribed manner; and prescribing also that they shall be affixed to the contrivances on which royalties are payable. The defendants

C. A. 1913

MONCKTON v. PATHÉ FRÈRES PATHE-PHONE, LIMITED.

allege that these provisions as to payment by adhesive labels and the requirement that they shall be affixed are ultra vires. Having regard to the wide terms of the statute, and especially the words "or otherwise securing the payment," and to the practical considerations referred to by my brother Phillimore in his judgment, I am of opinion that they are not, and that the defendants' cross-appeal should be dismissed.

Appeal allowed and cross-appeal dismissed.

Solicitors for plaintiff: *Stanley, Woodhouse & Hedderwick.*
Solicitors for defendants: *Whitelock & Storr.*

W. F. B.

1913
Dec. 15.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* SHELLAKER.

Criminal Law—Unlawful Carnal Knowlege of Girl under Sixteen—Evidence of previous Offence against the same Girl—Previous Offence more than Six Months before Commencement of Prosecution—Admissibility—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 5.

The accused was indicted for unlawfully and carnally knowing a girl under the age of sixteen within six months of the commencement of the prosecution, under s. 5 of the Criminal Law Amendment Act, 1885, which, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904, provides that no prosecution for this offence shall be commenced more than six months after its commission.

At the trial evidence was admitted of previous acts and conduct of the accused which tended to prove that he had had connection with the girl more than six months before the commencement of the prosecution:—

Held, that the evidence was admissible to prove the offence with which the prisoner was charged, although it might prove a previous offence for which he could not be prosecuted.

Reg. v. *Beighton* (1897) 18 Cox, C. C. 535, overruled.

APPEAL against a conviction at the trial before Rowlatt J. at Leicester Assizes.

The prisoner was indicted, under s. 5 of the Criminal Law

1913

REX v. SHELLAKER.

Amendment Act, 1885 (1), for unlawfully and carnally knowing a girl, above the age of thirteen and under the age of sixteen, between November 7 and December 8, 1912. The prosecution was commenced by an information and warrant on May 7, 1913.

At the trial evidence was tendered on behalf of the prosecution to prove that in April, 1912, the girl was found to be pregnant, and to prove certain conduct of the prisoner about that time and prior to November, 1912, which tended to shew that he was responsible for the girl's pregnancy. This evidence was tendered for the purpose of corroborating the evidence of the girl as to the offence with which the prisoner was charged in the indictment. Counsel for the prisoner objected to the admission of this evidence upon the ground that it would prove the commission of another criminal offence by the prisoner with which he was not charged, and that it would prove an offence under the Act of 1885 committed more than six months before the commencement of the prosecution. The learned judge ruled that the evidence was admissible, and the prisoner was convicted.

Sir Ryland Adkins, for the appellant. The evidence objected to was all inadmissible, first upon the broad general ground that it was directed to shew that the prisoner had committed other criminal offences besides that with which he was charged or was an evilly disposed person who was likely to commit the offence charged against him; and, secondly, because it related to matters which occurred more than six months before the prosecution was commenced. As to the first objection, the rules as to the admissibility of evidence of previous criminal acts are stated in *Rex* v. *Bond* (2), and this case does not come within the rules

(1) 48 & 49 Vict. c. 69, as amended by s. 27 of 4 Edw. 7, c. 15:—

Sect. 5: "Any person who:—

"(1.) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . . shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour . . . .

"Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than [six] months after the commission of the offence."

(2) [1906] 2 K. B. 389.

1913

REX v. SHELLAKER.

there enunciated. Here there was no question as to intent, or as to interpretation of facts which might be equally consistent with guilt or innocence, as in *Rex* v. *Ball.* (1) According to the general principles of the law of evidence, any evidence of previous offences by the prisoner against the same girl is inadmissible upon a charge of a subsequent offence. If such evidence were always admissible in cases of this kind, there would have been no necessity for the decision in *Rex* v. *Ball* (1), which shews that the rule or principle is not of general application and that the evidence was only admissible in that case because of the special relation between the parties.

Even if this evidence was admissible according to the general rule, yet it cannot be admissible in a case of this kind where there is a statutory limitation of the time within which an offence can be prosecuted. If the offence is one which cannot be made the subject of a prosecution because it was committed before the time fixed by the statute, then because that offence cannot be charged evidence of it cannot be given to prove a subsequent offence within the statutory period. It would be contrary to the spirit of the statute to admit any such evidence. Pollock B. in *Reg.* v. *Beighton* (2) decided that such evidence was not admissible against a prisoner who was being tried upon an indictment for an offence under sub-s. 1 of s. 5 of the Criminal Law Amendment Act, 1885.

[CHANNELL J. referred to *Reg.* v. *Ollis.* (3)]

The evidence was not admissible as being corroborative of the girl's evidence, because it would directly prove a previous offence and only incidentally be corroborative evidence. It is really evidence of evil disposition or bad character, and upon that ground is inadmissible.

C. A. McCurdy, for the prosecution, was not called upon to argue.

The judgment of the COURT (Isaacs C.J., Channell, Bray, Avory, and Lush JJ.) was delivered by

ISAACS C.J. In this case the appellant was convicted of having had unlawful carnal knowledge of a girl under the age of

(1) [1911] A. C. 47. (2) 18 Cox, C. C. 535.
(3) [1900] 2 Q. B. 758.

sixteen and was sentenced to twelve months' imprisonment. The appeal has in the main been based upon the contention that evidence was improperly admitted, to corroborate the girl's evidence, as to events which, it was said, shewed previous guilty relations between the prisoner and the girl. It was contended that this evidence ought not to have been admitted because it would or might disclose some previous offence committed by the accused more than six months before he was charged, and that upon that ground he was entitled to have the evidence excluded. That contention was supported upon two grounds. First, it was put upon the broad principle that to admit this evidence would be admitting evidence to shew that the accused was a man of evil disposition and likely to commit the crime charged against him, and that therefore the evidence was not properly admissible to throw any light upon the offence with which the prisoner was charged. It was further said that the effect of this evidence would be to prove an offence committed more than six months before the date when the charge was made against the accused, and would be proving an offence with which he could not then be charged.

We are of opinion that this evidence was admissible, apart altogether from the statutory restriction as to time. It was admissible upon the well-established general principle stated in the House of Lords in *Rex* v. *Ball* (1), although indeed the facts of that case were of a very special character. The House of Lords did not lay down any new principle, but merely applied the established principle to the facts of that case. That case followed a long line of authorities, of which *Reg.* v. *Ollis* (2) was one, in which it was held that such evidence was admissible. The rule was well stated by Channell J. in the latter case, where he said: "In such cases evidence of other transactions is admitted, not for the purpose of shewing that the prisoner committed other offences, but for the purpose of shewing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case may be. Such evidence is admitted, not because it tends to shew that

(1) [1911] A. C. 47. (2) [1900] 2 Q. B. at p. 781.

1913

REX v. SHELLAKER.

other offences have been committed, but notwithstanding that, in the particular case, it may happen to do so." It is quite easy to put cases where the application of this principle might cause hardship to the prisoner; but such cases might come within the class in which, though in strictness the evidence is admissible, the judge may be of opinion that it is of so little real value and yet indirectly so prejudicial to the prisoner, or that it is so remote, that it ought not to be given. That, however, does not affect the general principle. It is sufficient to say that in the present case the evidence objected to comes within the broad general principle stated in the cases to which I have referred and was properly admitted.

Then it was argued that notwithstanding that the evidence might be admissible upon the general principle, yet the words of the last proviso to s. 5 of the Criminal Law Amendment Act, 1885, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904, that "no prosecution shall be commenced for an offence under sub-section one of this section more than [six] months after the commission of the offence," make this evidence inadmissible. It has been urged that that proviso makes it inadmissible because its effect would be to prove an offence committed more than six months before the commencement of the prosecution. It is, however, at once apparent that the statute does not affect the broad general principle which I have stated and does not make this evidence inadmissible. It does not say that evidence of previous acts done more than six months before the prosecution shall not be admitted; the law of evidence is left untouched. If such evidence as this is admissible upon the principle which I have stated, it does not cease to be so because it relates to matters which occurred more than six months before the prosecution was commenced. It is clear that the evidence is admissible if it goes to prove the offence with which the prisoner is charged, although at the same time it may be evidence of an offence committed more than six months before the prosecution.

With regard to the decision of Pollock B. in *Reg.* v. *Beighton* (1), it is sufficient for us to say that, so far as it conflicts with the

(1) 18 Cox, C. C. 535.

principles which we have now laid down, it must be considered to be overruled.

1913

REX v. SHELLAKER.

Appeal dismissed.

Solicitors for appellant: *Owston, Dickinson, Simpson & Bigg, Leicester.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. H. W.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1912 *Nov.* 1.

C. A. 1913 *May* 23, 26, 27, 28, 29, 30; *July* 30.

ASIATIC PETROLEUM COMPANY, LIMITED *v.* LENNARD'S CARRYING COMPANY, LIMITED.

Ship—Fire—Fire caused by Unseaworthiness—"Actual fault or privity" of Owners—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . . ":—

Held by Buckley and Hamilton L.JJ., that where the fire which destroyed the cargo was caused by the unseaworthiness of the ship, and the unseaworthiness itself was not without the fault or privity of the owners, the owners were not relieved by the section from liability for loss of the cargo by fire.

Held, also, by Buckley and Hamilton L.JJ. (Vaughan Williams L.J. dissenting), on the facts of the case, that the loss had happened with the actual fault or privity of the owners, inasmuch as the managing owner, who had knowledge of the defective condition of the vessel's boilers, failed to give special instructions to the captain and chief engineer regarding their supervision or to take any steps to prevent the vessel putting to sea with her boilers in an unseaworthy condition.

APPEAL of the defendants from a decision of Bray J.

The plaintiffs in their statement of claim claimed damages for breach of contract and also for breach of duty in and about the carriage of a cargo of benzine on board the defendants' steamship *Edward Dawson*. The following statement of the facts is taken from the judgment of Bray J.

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

"This action was brought by the indorsees of certain bills of lading under which benzine oil was to be carried by the defendants on board their tank steamer *Edward Dawson* from Novorossisk to Rotterdam. The *Edward Dawson* shipped the oil at Novorossisk and sailed on September 7, 1911. She went ashore near Flushing on October 1, and within six hours thereafter the oil took fire and was destroyed. The plaintiffs alleged that the *Edward Dawson* was unseaworthy when she left Novorossisk owing to defects in her boilers; that she was driven ashore owing to want of steam arising from those defects; and that the fire was caused by the stranding and its consequences. The defendants disputed these allegations and contended further that they were protected by s. 502 of the Merchant Shipping Act, 1894. (1)

"The first question I have to determine is whether the ship was unseaworthy when she left Novorossisk. The *Edward Dawson* (originally bearing another name) was built in 1890. New boilers were put in in 1896. She was bought by the defendants in 1907 for 7500*l.*, and a large sum, about 6550*l.*, was then spent upon her in repairs, which included repairs to the boilers. She arrived in Birkenhead in January, 1911, having sustained some damage on her last voyage. She was repaired there, and was then surveyed there on behalf of the Bureau Veritas. Mr. Viehoff, the surveyor, after the survey indorsed a certificate extending her class (the first division) for another twelve months from March, 1911, on condition that the working pressure in the boilers should be reduced from 160 lbs. to 130 lbs. She sailed from Birkenhead to Kustendji in ballast on February 20, 1911, and returned with an oil cargo to Cette. From Cette she sailed again in ballast to Kustendji, and came back to Cette with another oil cargo. She left again for Kustendji in ballast and took oil on board there, and brought

(1) By s. 502 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . ."

her cargo to Thames Haven, where she arrived on June 10. After some repairs to her boilers there, she left in ballast for New York, where she shipped an oil cargo for Spanish ports, the last of which was Barcelona. She left Barcelona in ballast, arrived at Novorossisk on September 1, left that port with a cargo of benzine oil on September 7, and was lost in the North Sea as I have already stated. A great deal of evidence was given as to the condition of the boilers during these voyages."

J. R. Atkin, K.C., *Maurice Hill, K.C.*, and *F. D. MacKinnon*, for the plaintiffs.

Bailhache, K.C., and *Adair Roche*, for the defendants.

Cur. adv. vult.

1912. Nov. 1. BRAY J. [After stating the facts as above, the learned judge reviewed the evidence at length, coming to the conclusions, first, that the vessel was unseaworthy when she left Novorossisk by reason of the defects in her boilers; secondly, that the stranding was caused by want of steam, which was caused by the unseaworthy condition of the boilers; and, thirdly, that the stranding was the effective cause of the fire which caused the loss of the benzine. He then proceeded as follows:] I now come to the question of the effect of s. 502 of the Merchant Shipping Act, 1894. It has been decided by the Court of Appeal in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) that the immunity given by this section applies even though the fire was caused by the ship being unseaworthy, but the section itself provides that the immunity is not given unless it happens without the fault or privity of the owner. I think it may be right to say that it is the fire that must happen without fault or privity of the owner. Inasmuch, however, as I have found that the fire was caused by the unseaworthiness, I think I must see whether the unseaworthiness was caused without the fault of the owners. It could not truly be said that the fire was caused without the fault of the owners if

(1) [1912] 1 K. B. 229.

1912

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Bray J.

the unseaworthiness was caused by the fault of the owners. I have, therefore, to inquire whether they were to blame for the unseaworthiness. Now, it is not disputed that the fault of the managing owners is the fault of the owners. The managing owners were Messrs. J. M. Lennard & Sons, Limited. Except that letters were apparently written to Mr. J. M. Lennard, I have nothing to shew whether he or the board of directors of that company assumed the duty of management with respect to this ship. I do not think it matters. It has been suggested that they delegated their duty to Mr. Smaling as marine superintendent. I do not think they did. That gentleman was employed from time to time, but he did not in any sense represent the managing owners. He did not undertake the general supervision of the ship. He had not duties while the ship was at sea. The captain did not communicate with him, but with the managing owners. Mr. Smaling merely visited the ship when it came into port and acted upon the instructions he received. The duty of supervision I find remained with the managing owners. Now, what is the degree of care which the owners must take in carrying out the duty of seeing that the ship is seaworthy? In my opinion I ought to apply a high standard to this duty. If the ship is allowed to go to sea in an unfit state, grave consequences follow. The lives of many men are at stake, and very valuable property. The utmost care must be taken. The duty must be fulfilled most thoroughly. Was it so fulfilled here? Mr. Hill, for the plaintiffs, contends, first, that the owners were to blame in not having proper repairs done at Thames Haven, and, secondly, that the system was bad, that there was no efficient supervision, and, if there had been, they would have learnt of the condition of the boilers at New York, Barcelona, and Novorossisk, and they would have known that the ship should never have been allowed to leave Novorossisk. They would have known of the condition of unseaworthiness which I have found to exist. As to Thames Haven, I doubt if the case is sufficiently proved. It is true that they received a copy of the letter from the charterers of June 9, but not till after the ship had arrived, and after Mr. Smaling was instructed, and they might have thought

the instructions which had been previously given to Mr. Smaling were sufficient. I think I ought to give them the benefit of the doubt, but in my opinion something should have been done with regard to the future. They had ample warning that there might be danger. They had learnt when the ship was at Birkenhead that the boilers were so weak that the pressure had to be reduced from 160 to 130, a pressure which, if sufficient, in my opinion left no margin. They learned when the ship was at Thames Haven that even within four months increased weakness had developed and that there had been leakages in many parts. The repairs there had cost nearly 200*l.*, and the items shewed that what was done was merely repairing the then existing leaks. They had the letter from the charterers to which I have referred. Any reasonable man would know that the boilers could not last long, and that at any moment further weakness might develop. In my opinion it was their duty at least to give special instructions to the captain and engineer to do two things—first, to report to them from each port where the ship touched as to how the boilers had behaved on the voyage, and, secondly, if further weakness developed, to have the boilers completely examined by some competent, independent person. It would not be sufficient in my opinion to leave everything to the discretion of the captain and chief engineer. What did they do? They realized that new boilers were urgently required. They ordered them at the end of July and stipulated that they should be ready by the middle of November, but they gave no special instructions to the captain or the chief engineer and no warning of the danger which they themselves probably realized, or, at all events, ought to have realized, and they did not even require that the log book of the voyage which ended at Thames Haven should be sent to them. Mr. Marshall, the secretary, was called. His evidence was vague as to what the captain and the chief engineer should have done in the way of sending the log book and reporting, but it is clear that, if they had any duties, neither the secretary nor the directors required that they should be carried out. Nothing in the way of reports was sent except the meagre letters from the captain which gave no intimation of the real state of things. Now, none of the managing owners were called, not even

1912

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Bray J.

Mr. J. M. Lennard, who probably was the person who took the most active part in the management of the ship. The directors' minute-book containing the minutes of what was done at the board meetings contained, I was told, nothing. There are no documents giving any information or explanation; I was told there was no answer to the charterers' complaint. In the absence of any explanation I must come to the conclusion that the managing owners failed in their duty and that if they had done what they ought to have done—namely, insisted on having the fullest information given to them of the behaviour of the boilers subsequent to the ship leaving Thames Haven—they would have learned that the ship was unseaworthy. I find that the cargo was not lost without their fault, but by their fault. They are not, therefore, entitled to the protection given by s. 502 of the Merchant Shipping Act, 1894. Under these circumstances it is unnecessary to consider whether the terms of the bill of lading excluded the operation of s. 502. If the defendants are only entitled to the protection of the bill of lading and the terms of the charterparty incorporated therein, it is not contended they would not be liable. Under this contract, therefore, the defendants are liable for loss or damage caused by the unseaworthiness of the *Edward Dawson*. I have found that the cargo was lost by reason of this unseaworthiness; therefore I must decide the question of liability against the defendants. The amount of the damages, I understand, is to be determined elsewhere. The plaintiffs must have the costs of the action up to now.

Judgment for plaintiffs.

The defendants appealed.

1913. May 30. *John Sankey, K.C.*, and *Adair Roche, K.C.*, for the appellants.

Atkin, K.C., *Maurice Hill, K.C.*, and *F. D. MacKinnon*, for the respondents.

Cur. adv. vult.

July 30. VAUGHAN WILLIAMS L.J. read the following judgment:—Bray J. begins his judgment by thus stating the cause

of action: "This action was brought by the indorsees of certain bills of lading under which benzine oil was to be carried by the defendants on board their steamer *Edward Dawson* from Novorossisk to Rotterdam. The *Edward Dawson* shipped the oil at Novorossisk and sailed on September 7, 1911. She went ashore near Flushing on October 1 and within six hours after the oil took fire and with the ship was destroyed. The plaintiffs allege by the statement of claim that the *Edward Dawson* was unseaworthy when she left Novorossisk owing to defects in the boilers. The plaintiffs allege also that she was driven ashore owing to want of steam arising from those defects and that the fire was caused by the stranding and its consequences. The defendants disputed these allegations and contended further that they were protected by s. 502 of the Merchant Shipping Act, 1894." This seems to me to state sufficiently the matters in dispute in this action.

Sect. 502 of the Merchant Shipping Act, 1894, runs thus: "The owner of a British sea-going ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (1.) where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . ."

Bray J. deals first with the question whether the ship *Edward Dawson* was unseaworthy when she left Novorossisk. He comes to the conclusion that the *Edward Dawson* when she left Novorossisk was unseaworthy by reason of the defects in the boilers, and Mr. Sankey, who argued this case on behalf of the defendants, admitted this unseaworthiness at Novorossisk.

The next question Bray J. propounds to himself is "whether the ship was stranded owing to the inability of the boilers from their defects to raise sufficient pressure of steam." Bray J. comes to the conclusion that before entering the channel the combustion chambers of the two centre furnaces had been so completely salted up that there were then only four available instead of six. The ship passed Dover at 3 A.M. on Saturday, September 30; soon after there was a gale with heavy sea; at 3.30 the captain, who up to that time had kept his course to Rotterdam, hove to, that is, turned the ship's head to the wind, which was slightly west

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Vaughan Williams L.J.

of north. After stating these facts, Bray J. says, "I see no ground for saying that this was not a prudent course."

I agree that this statement of the condition of the ship up to the time of the turning of the ship's head to the wind is fully justified by the evidence, except that I think Bray J. understates the violence of the gale. Looking to the independent weather reports, I think that it is plain that the gale was of a hurricane type, notwithstanding the evidence of Captain Wood, of the *Wrexham*, which was in the North Sea on that night, who said that it was a gale that an ordinary boat of the class of the *Edward Dawson* should have been able to ride out successfully with seaworthy boilers. The *Wrexham* was in a different part of the North Sea, under the shelter of the English coast and not on the Dutch coast, and the list of wrecks which was put in is eloquent of the violence of the sea on that night on the Dutch coast.

I think that the evidence shews that, until the tube burst, the boilers of the *Edward Dawson* enabled her to hold her own against the drifting, and that there is no evidence to shew that the tube which burst was an old tube of fifteen years' standing and not a new tube which sometimes burst unexpectedly with the best machinery. I therefore doubt if the evidence justifies the conclusion by Bray J. that "the stranding on the Botkill Bank was caused by want of steam which was caused by the unseaworthy condition of the boilers. I find the same with regard to the second stranding. Once having been driven into the Botkill Bank, what happened afterwards was the natural consequence of having been driven into such a dangerous position with possibly some injury to her steering gear." If this conclusion of Bray J. had been a conclusion arrived at on a conflict of evidence or a conclusion of fact based on evidence of actual facts spoken to by witnesses, the duty of this Court would, prima facie at all events, be to accept such findings, but the conclusions with which the Court has to deal here are mere probabilities based on evidence which has no direct application to the conclusions arrived at by the learned judge.

The next question dealt with by Bray J. is whether the loss of the cargo was the consequence of the stranding. The learned

judge says: "I suggested to counsel in the course of their arguments that if it was shewn that the stranding caused a danger to arise, that even though reasonable care were taken the benzine might catch fire, and not owing to any negligence, then the stranding was the effective cause of the loss of the benzine. I am not putting this as an exhaustive statement of the law on the subject, but both counsel accepted it as sufficiently correct in this case. Now it was clear that the tanks were injured by the stranding to such an extent as to allow some of the benzine to escape. Where it escaped was not ascertained nor the extent of the leakage, but the leakage was serious, and the captain and the engineers realized that there was serious danger of the benzine causing an explosion and taking fire. The fires were ordered to be drawn and between 11 and 12 A.M. the chief engineer ordered every one out of the engine room and stokehole because of the danger. I am satisfied that there was real danger, even though due precautions were taken to prevent it. It was urged for the defendants that, if reasonable precautions had been taken, there would have been no explosion or fire. I think the probable cause of the explosion was the gas from the benzine getting into the combustion chamber. It was said for the defendants that the chief engineer should have had water poured into the combustion chamber by means of a hose from the ashcock so as to extinguish any hot ashes there. It is always easy to be wise after the event, but was this a precaution, which a reasonably prudent engineer would have taken? It never occurred to any one of the engineers to suggest that it should be done, although every one realized the danger of an explosion. It certainly is not a usual thing to do. I do not think that any of the witnesses had heard of its being done under any circumstances. They differed as to its being a dangerous thing to do. I think it would obviously be somewhat dangerous. There was no hose attached to the ashcock, though it was said there was a hose on deck. I find it impossible to say that either the captain or the engineers were negligent in not taking this precaution. I find that the loss of this cargo was caused by the unseaworthiness of the boilers."

The evidence is that there was a hose on deck. I see no

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Vaughan Williams L.J.

evidence to the contrary, and it is notorious that vessels of this class which carry benzine as a rule have a hose on deck, and in case of fire or danger of fire and explosion the hose would be a natural thing to use to prevent fire or explosion. Against this it is said that it never occurred to any one of the engineers to suggest that water should be passed by means of the hose into the combustion chamber so as to extinguish any hot ashes there, and that the witnesses (not being those who were in fact on board the unfortunate ship) differed as to its being a dangerous thing to do. Bray J. seems from the language of part of his judgment to doubt whether there was a hose on deck and to treat it as negligence if there was not a hose on deck, but to have come to the conclusion that if there was it was not proved that the hose could have been safely used to extinguish any hot ashes which might find their way into the combustion chamber. Of course, it is for the interest of the shipowners to shew that there was negligence of the engineers or crew which contributed to the explosion.

I should mention here that, besides the findings of Bray J., there was a suggestion put forward in the argument that, even if there had been no fire, the cargo was lost on the second stranding, as thereafter it could never have been conveyed to its port of destination. As to this contention, I may at once say that there was no evidence to support it, and at best it was merely a suggestion of a possibility. Having now set forth the findings of fact of Bray J., I propose to consider the question of whether there was evidence to support them.

Now, it was argued before us that, even if there was no evidence to support any one of these findings, the defendants cannot rely on such absence of evidence, because the onus of negativing actual fault or privity lay on them. I cannot agree. In the first place, the plaintiffs by their pleadings took on themselves this onus, and, moreover, when they launched their case, called many witnesses to prove the actual fault or privity of the defendants. In my opinion not only did the plaintiffs, by their pleadings, their evidence, and their conduct, assume that the onus was on them, but Bray J. accepted this view and never suggested that the onus was on the defendants.

Moreover, in my opinion, the words of s. 502 of the Merchant Shipping Act, 1894, when rightly construed, threw this onus on the plaintiffs.

Perhaps it is worth while to set out the substance of the pleadings. The points of claim, paragraphs 7 and 8, allege the unseaworthiness of the ship at the commencement of the voyage from Novorossisk, and "that the boilers were at all times during the said voyage in an unfit and unseaworthy condition. They were old and worn out. Tubes had burst on a previous voyage and had been stopped with wooden plugs. Many tubes were leaking, whereby salt accumulated in the tubes and prevented the fires drawing. All these defects were not remedied, and increased on the voyage from Novorossisk to Rotterdam. On or about October 1, 1911, the steamer encountered a gale off the coast of Holland, and in consequence of the said defective condition of the boilers it was impossible to generate sufficient steam power to withstand the effects of the gale. The vessel was in consequence driven on the Zoutelands Banks and her cargo totally lost."

The defence, by paragraph 4, says that "the said cargo was lost by reason of fire on board the *Edward Dawson* on October 1, 1911, and subsequent days, and by virtue of s. 502 of the Merchant Shipping Act, 1894, the defendants are not liable."

The plaintiffs, by their points of reply, paragraph 1, deny that "the cargo was lost by fire within the meaning of the section of the Merchant Shipping Act," and further allege that "if the vessel was lost by fire, such fire was occasioned by the unseaworthiness."

It is of the greatest importance in this case to determine the precise meaning of the words of s. 502 of the Merchant Shipping Act, 1894. It was held in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Shipping Co.* (1) that s. 502 applies, and affords to the shipowner protection from liability, even though the ship was unseaworthy, for the words of the section are "British sea-going ship" and not "British seaworthy sea-going ship." Now I do not say that, if the ship commenced its voyage unseaworthy with the actual fault or privity of the shipowner, this

(1) [1912] 1 K. B. 22.

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Vaughan Williams L.J.

would not deprive the shipowner of the exemption from liability, but I think that the fault or privity must relate to the actual voyage and must be the result of fault or privity of the owner in respect of the voyage in the course of which the fire occurred causing the loss of or damage to the cargo. I agree that the words "fault or privity" cover faults of omission as well as of commission, but I think such fault or privity must relate directly to the voyage in which the loss by fire occurred, and, further, I think that, if the captain ought not, in the condition in which the vessel then was, to have started on the voyage from Novorossisk to Rotterdam, the shipowner cannot be held liable for the loss by fire of this cargo occurring in a voyage which, if the captain had done his duty, should not have been commenced until the ship had been put by repairs in a proper condition; the omission of the responsible officer of the company, which on behalf of the shipowners acted as managers, to get information from time to time as to the condition of the ship during the successive voyages does not seem to me in principle to be distinguished from faults of the captain. The manager and the captain are each of them acting as the agent or servant of the shipowner, and, in my opinion, a fire which results from the fault either of the captain or of such a manager is not from the fault or privity of the shipowner, so as to deprive him of the exemption from liability given to shipowners by s. 502.

Moreover, the fault of omission which is imputed to the shipowners in this case seems to me altogether too remote to be recognized as a causa causans of the loss. I cannot find in the evidence sufficient to shew that the shipowners, or even their manager, had information from which the inference necessarily ought to have been drawn that the ship was in an unseaworthy condition. I do not think that it was argued that there was any such necessary inference to be drawn from the captain's communications by letter. I do not think that it was a necessary inference from the scantiness of communications that there must be something wrong.

If these considerations which I have been setting forth are well founded, it necessarily follows that the findings in fact of Bray J. cannot be supported.

I have not mentioned the question of warranty arising on the terms of the bill of lading. That we have left over to be raised hereafter, if necessary, as it has been decided in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) that the operation of the statute may be excluded by special contract and the owners be liable where it can be established that there has been a breach of warranty of seaworthiness.

In my opinion this appeal should be allowed, but no judgment in the action should be entered until the point on the terms of the bill of lading has been determined by judgment or abandonment.

BUCKLEY L.J. read the following judgment:—The plaintiffs sue for breach of contract and breach of duty in and about the carriage of a cargo of benzine from Novorossisk to Rotterdam. Their claim is for damages for non-delivery of the goods. The goods have been totally lost. The defendants plead by way of defence two separate matters, the first that they are relieved from liability by s. 502 of the Merchant Shipping Act, 1894, and the second that the loss was due to perils excepted by the contract of carriage. The learned judge decided the case, and we have heard the appeal upon the first only of these grounds of defence. In case the defendants elsewhere put forward the second, it will remain open to the plaintiffs to resist that defence upon grounds into which it has been unnecessary to go before us.

Before going to the facts of the case, I will state what in my view is the effect of s. 502 of the Merchant Shipping Act, 1894. If the loss of the goods by fire happens without the owner's actual fault or privity he is free from liability, even if his ship was unseaworthy. The benefit of the section extends to British sea-going ships and is not confined to seaworthy British sea-going ships. That was the decision of this Court in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) But if the unseaworthiness itself was not without the actual fault or privity of the owner and if the fire was occasioned by the unseaworthiness the owner is in my judgment not relieved by the

(1) [1912] 1 K. B. 229.

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Buckley L.J.

section from liability. The loss in that case has not happened without the owner's actual fault or privity, it has happened with his actual fault or privity, for the causa causans of the loss was the unseaworthiness which occasioned the fire which destroyed the goods.

The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words "actual fault" are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act of omission to do something which he ought to have done, he is no less guilty of an "actual fault" than if the act had been one of commission. To avail himself of the statutory defence, he must shew that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to shew knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section.

As regards the facts of the present case, the learned judge finds that the ship when she left Novorossisk was unseaworthy. The appellants do not dispute before us that this finding is right. Secondly, that the stranding of the ship was due to the unseaworthiness in that the boilers were not seaworthy, and that it was by reason of their inability to provide a sufficient head of steam that the ship was stranded. That finding in my opinion was right. Thirdly, that the escape of the benzine was due to injury to the tanks in which it was contained caused by the stranding; that by reason of the unseaworthiness of the ship she was so strained as that the tanks began to leak and the benzine was thus exposed to the probability of fire. That finding in my opinion was right. From these facts the judge concludes that the loss of the cargo was caused by the unseaworthiness of the boilers. The destruction of the cargo was due of course to the fire. But the loss of the cargo may or may not have been caused by the fire. That depends upon whether the cargo was lost when the ship stranded for the second time and before the fire occurred. If it was, then

I need not concern myself with s. 502. The first question therefore is whether the cargo was lost before the fire broke out. Upon this point a question arises as to the onus of proof. The ship was stranded; could she ever have been got off in an efficient sense, that is to say, so that the cargo could have been delivered according to the contract of carriage? Starting with the fact that she was stranded, the onus was, I think, upon the defendants to shew that she could have been so efficiently got off and the cargo taken to Rotterdam or that the cargo could have been got out and carried to Rotterdam, had there been no fire. They have not discharged that onus. There is some evidence, I do not say more than that, that if there had been no fire the vessel might possibly have been got off. But there is no evidence that in the condition in which she was—strained, injured, with her decks buckled, with the benzine escaping from the tanks and no possibility of lighting her fires and getting up steam without danger of ignition—that she could have been so dealt with by tugs or otherwise as that the cargo could have been delivered. Upon this first ground, therefore, I think that the defendants fail. But, secondly, I will assume that the cargo was not lost before the fire broke out. It remains, however, that it was lost by a fire which would not have taken place had the vessel been seaworthy for the conveyance of this cargo. Under those circumstances the statute is in my opinion no defence, unless the defendants shew that the unseaworthiness which was the cause of the fire was without their actual fault or privity.

It remains to decide whether the unseaworthiness existed without the actual fault or privity of the defendants. I must now apply the principles which I first stated as regards that which in my opinion is the true construction of the section. I do not propose to detail the facts which the learned judge has given at considerable length. I shall do no more than suggest or sketch the heads which seem to me material upon this question. The exact question to be answered, I think, is this: when the ship left Novorossisk had she become and did she subsequently remain unseaworthy without the actual fault or privity of the defendants? The defendants are a limited company. The actual fault or privity must under these circumstances be that of

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Buckley L.J.

some natural person or persons acting on their behalf. Those persons are the managing owners, or, inasmuch as the managing owners were themselves again a limited company, the person who acted for that company in the matter. That person was Mr. Lennard. The actual fault or privity to be looked for therefore is that of Mr. Lennard. Going back no further than the year 1909, it was known to him from the logs in his possession that on January 8, February 15, and February 17, 1909, tubes in these boilers were bursting as recorded in the logs at p. 243, question 4682, and that on April 8, 1909, there were heavy leaks and that the pressure was reduced to 110 lbs. (question 4666). He knew also that the standing order to the master was to send the log books to the managing owners. That was the master's duty, although it was practically unobserved (p. 234, questions 4528 to 4550), and it was the master's duty to report direct to the managing owners if the boilers had been found to be leaking (questions 4561 to 4568). The ordinary life of the tubes in boilers such as these is eight to ten years (Sir F. Flannery, question 1976) or nine to ten years (Mr. Swainton, question 2166). These tubes were fifteen years old. In February or March, 1911, the vessel was surveyed by the Bureau Veritas and her certificate was extended for twelve months. Upon this fact the defendants place great reliance. But soon after that, namely, on June 9, 1911, the managing owners received the letter of that date suggesting that there was something greatly wrong with the engines and boilers and giving reasons. Then came the visit of Mr. Clark, in place of Mr. Smaling, to Thames Haven some two days later and the repairs at that port. There followed the repairs, miscellaneous but not serious, at New York and the subsequent voyages to Barcelona and then to Novorossisk. At Barcelona the salt which had formed to a depth of about eighteen inches was all or practically all cut out (p. 171, questions 3164 to 3166) and she started from Barcelona to Novorossisk clear of salt. When she reached Novorossisk, a journey which took eleven or twelve days and was substantially shorter than would be the voyage from that port to Rotterdam (twenty-three or twenty-four days), the furnaces were salted up above the bridge, a state of things which Sir Fortescue Flannery said he had never heard

of in his life (p. 98, questions 1942, 1943). The salt was cut out again, and by the time she reached the English Channel she was so salted up as that both the port and starboard centre furnaces were blocked up altogether, and the climax came when during the gale (for I have no doubt at all that the weather was very heavy) a tube burst in the one boiler which put that boiler out of action and left the vessel for some hours so hopelessly without power that she was driven on the bank and the results ensued. Under these circumstances it seems to me that the managing owners had affirmatively to a very large extent knowledge, and had beyond that most substantial means of knowledge. This was, I think, an actual fault and was the actual fault of the owners by Mr. Lennard, their managing owner. It follows that, even if the loss of the cargo is to be attributed not to the stranding but to the fire which followed upon the stranding, the defendants are not entitled to the relief from liability given by s. 502 of the Merchant Shipping Act, 1894.

For these reasons I am of opinion that the judgment under appeal was right and that this appeal must be dismissed with costs.

HAMILTON L.J. read the following judgment:—I agree that this appeal fails. I accept Bray J.'s conclusions of fact. I think that the steam dropped and eventually the tube gave out owing to that continuing leakiness and general deterioration of the boilers and tubes which made the ship unseaworthy before she left Novorossisk. I think that the stranding followed on the failure of steam during a gale on a lee shore, the leakage of the oil tanks followed the stranding, and the ignition and consumption of the oil cargo followed the leakage, in each case as the natural and direct consequence of the preceding event. In my opinion there was no negligence on the part of the master, officers, and crew in failing to inject cold water with hose into the hot combustion chambers in order to extinguish every possibility of ignition of the benzine vapour. I am not prepared to say that the vessel might not have been got off and turned into Rotterdam and have there discharged her cargo, if no fire had occurred. Certainly there is no express

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Hamilton L.J.

evidence of it, but nowadays tugs are so plentiful and salvors so skilful that I will not say that it could not have been done. I am clear that the operation would have been very speculative. The ship must have been steered as well as towed by her tugs, must have secured a spell of fine weather during October, and must have had the luck with her, both in getting afloat and in getting into Rotterdam. If she strained a butt or two or broke adrift, I think she would have been lost. If Bray J. had found that ship and cargo were truly lost as soon as she took the ground on the Zoutelande Bank, I should not have differed from him, and so I was disposed to read his judgment, but some doubt having been expressed about it, I do not assume or act upon any such finding.

Can it be said that the cargo was burnt without the actual fault or privity of the owners? Though I think that the whole onus lies on the shipowner of proving as a defence loss by a fire, of which he can predicate that it happened without his actual fault, and that "without his actual fault or privity" in s. 502 of the Merchant Shipping Act, 1894, differs in this respect from negligence in connection with excepted perils in a bill of lading (*The Glendarroch* (1)), I need not decide it, for the facts proved are quite sufficient for the purpose, let the onus lie where it may.

Where the Legislature has selected one adjective for employment, I think little is to be gained and often much to be lost by paraphrasing it with another. Actual fault negatives that liability which arises solely under the rule of "respondeat superior." In that sense it conveys the idea of personal fault, but it does not necessarily mean that the owner must have laid the train or set the torch himself. Nor again does it mean that the owner must have been the sole or next or chief cause of the fire. It is fire "without his actual fault," not fire "except where caused by his natural action." The question is, could it be said of the fire that the owners had nothing to do with it but only their servants, or that for this fire not they but only their servants, if any person, were to blame? It is not enough that the happening of the fire is the servants' fault; it must also not be

(1) [1894] P. 226.

the owner's fault. The cases shew this. Channell J. uses the word "personal" in *Smitton* v. *Orient Line* (1); "if they come within the section the defendants are not liable, unless the loss is occasioned by their personal fault"; but his next words shew that he was, in accordance with the facts of the case, speaking strictly of a matter that fell within the servants' sphere and not the master's, namely, the placing of a watch-pocket in a berth on a large passenger steamer. If "actual" meant "personal" in the sense that the owner must have caused the fire himself, the whole of the discussion and judgments of this Court, as reported in *The Fanny* (2), were superfluous. Butt J. in *The Warkworth* (3), a case affirmed on appeal and repeatedly cited with approval, says (4) that "the words shew an intention to relieve the shipowner when damage has been caused by the fault of his servants and he himself has not been in any way to blame," and in *The Diamond* (5) Bargrave Deane J. says similarly, "the owner is not liable, unless he himself has been guilty of some fault or privy to the matters which caused the damage." In the case most in the appellants' favour, *The Spirit of the Ocean* (6), Dr. Lushington only speaks of the section as applying when the owners "have not incurred any blame as to the collision in question," and adds that "it is personal blame which is the ground of the forfeiture of the exemption from limited liability," but there clearly the owners could only have been liable for their captain's negligent navigation as his responsible principals.

In the case of a company, the "owners" within the meaning of the section must be the person or persons with whom the chief management of the company's business resides. In this case one, and seemingly the chief, of such persons was Mr. John M. Lennard, the owning company itself being managed by another limited company, in which he is a, if not the, moving spirit. If "fault" is to be defined, I know no better definition than that given by Bowen L.J. in *In re Young and Harston's*

(1) (1907) 12 Com. Cas. 270.
(2) (1912) 28 Times L. R. 217.
(3) (1883) 9 P. D. 20.
(4) 9 P. D. at p. 21.
(5) [1906] P. 282.
(6) (1865) Br. & L. 336; 34 L. J. (Adm.) 74.

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Hamilton L.J.

Contract (1): "default is a purely relative term just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." True this is said of "default" occurring in a contract for the sale of land, but I think that the words are synonymous and the context for present purposes immaterial.

In the present case the managers had, from time to time, such knowledge of the matter as made them blameworthy for the ship's unseaworthiness and for not interfering to prevent her sailing on her last voyage in that state of continuing unseaworthiness which directly caused the loss of ship and cargo. They knew the boilers to be old, and when the Bureau Veritas surveyor continued the vessel's class, but with a reduction of pressure, early in 1911, they supposed, somewhat oddly, that the repairs then done freed them from further expenditure on wear and tear during twelve months. In June they were disillusioned. The boilers were then found to have various defects which on June 12, the first day they were examined and before the full extent of the defects was known, were reported as miscellaneous and "not very serious." A considerable sum was spent, but merely in dealing with and making good leaks and other defects and not on general strengthening or renewal. The time charterers complained that she was very slow, and the captain's letters admitted the fact and gave explanations as to bad coal and foul bottom that do not seem to me sufficient. At least by July the owners were fully put upon inquiry and should have made it their business to find out why the boilers were so soon again requiring expenditure for wear and tear, and whether the complaints of want of speed did not point to the same cause, namely, further leakage from old age—for they knew that the boilers were old. They did in July order new boilers for delivery in November. I have no doubt this was a matter for the managers and not for any mere subordinates. Various explanations of their conduct were offered. One given by the secretary as to the

(1) (1885) 31 Ch. D. 168, at p. 174.

reason for requiring delivery in November broke down. The rest were given by counsel in argument. But the state of the managers' mind is matter of fact, and in my opinion it ought not to have been suggested but proved. As they did not choose to prove what their reasons and inferences were, we must infer them from what was proved, and I agree with Bray J. that they realized then how much faster the boilers were deteriorating than they had expected. They now saw that they could count on nothing like the twelve months' life which they had expected in March. They took the proper step of preparing to replace the boilers at the end of nine months, but they took no steps to ascertain whether the nine months might not be as over-sanguine an estimate as the twelve; they took none to enable them to stop the vessel in case of need before she started on a voyage on which, as it turned out, life and property were not only risked but lost. From motives not accounted for, but not unaccountable, they let the pitcher go once too often to the well. I think the true inference is that they acted from carelessness or economy or both, both being equally reprehensible.

There was a very simple way in which the managers could have kept themselves informed of the vessel's condition, so as to control her fate and fortunes. It was their rule, or it should be on all steamship owners' services, that at the end of each voyage the engineers' logs should be sent to the office and presumably be examined by those whose business it was to inform themselves about the condition of the engines and boilers. This rule the managers allowed to be systematically disregarded. In the case of boilers which required close watching it would have been natural to instruct the chief engineer to take advantage of ports of call and to report on their condition and progress by letter. This was not done. At Thames Haven Clark is said to have looked at the log. That is all. Till the ship was at Novorossisk the managers were receiving no reports about the boilers, and for inexplicably long periods no letters at all about the ship, and yet they made no inquiry. It is impossible to say that there was no actual fault in this.

Logs and reports, if sent, would in my opinion have disclosed what was happening, and would have told the managers, as men

C. A. 1913

ASIATIC PETROLEUM COMPANY, LIMITED v. LENNARD'S CARRYING COMPANY, LIMITED.

Hamilton L.J.

of experience, that the ship must no longer go to sea depending alone on her own supply of steam. In the ordinary course such things as tubes giving out would have been noted in the log. It had been so before in the case of this ship. In the ordinary course there would have been some, and probably many, entries shewing how steam was falling and boilers leaking, entries about filling up the boilers with sea water and clearing salt from the combustion chambers. A mere examination of the deck log to check the number of knots run against conditions of wind and weather would, over a period of a week or two, have been useful in shewing whether steam power was failing and therefore leakage increasing. Careless the engineers might be, but I see no reason why they should keep such things out of the log or out of their letters to their owners. It is true that the learned judge found, and justly found, that the chief engineer was a lying witness, though to be sure the man lied on his oath to promote, as he thought, his masters' interests, but in his own he would, if called on, have reported the truth about the boilers with a view to amendment; for in their condition they must have been troublesome in work and, if the worst came to the worst, perilous to life. If the managers had used these sources of information, which they unjustifiably neglected, they would have learned, and learned in time, how much worse the condition of the boilers was. I do not say that a written report from Novorossisk would have informed them in time to stop the ship when coaling at Algiers or when passing Gibraltar, for the course of post to England is not proved, but, from the time the ship reached the Mediterranean from New York, that alarming process of salting up the combustion chambers was in progress, which ultimately filled the back ends bridge-high with salt on the passage between the Black Sea and the Straits of Dover and sent the ship to her doom. In fact the boilers were, and long had been, so leaky in seams and stays and tubes that the water soaked out of them as out of a sponge. One has only to realize the size of the combustion chambers and the cubical contents of the spaces up to the height of the bridges and to remember that this was filled with salt left after the evaporation of water, which at first could only have been

brackish—for the ship would at least start with fresh water in her boilers—and it will be seen how prodigious this leakage was. There may be some exaggeration in the story. Some salt was left in at Novorossisk; some, even a considerable part, of the solid matter may have been coal or cinders. Still the amount of the leakage was enormous and it had been going on a long time. Even a landsman can see the significance of it. I picture to myself this vessel labouring up the North Sea with a nor' westerly gale on her port beam and the shoals of the Scheldt to leeward, then lying head to wind and sea and still failing to hold her own, then breaking down and going astern, and all for want of steam. I recall that with proper diligence the owners might have prevented all this and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners ask this Court to find that the fire, which naturally ensued in the circumstances, "happened without their actual fault or privity," I refuse.

This conclusion makes it unnecessary to discuss the question whether the bill of lading, which contains excepted perils including fire, but does not mention unseaworthiness, is expressed in terms which would oust the application of s. 502, and I express no opinion about it.

Appeal dismissed.

Solicitors for appellants: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for respondents: *Parker, Garrett & Co.*

W. J. B.

1913
Nov. 12, 13.

STOTT (BALTIC) STEAMERS, LIMITED *v.* MARTEN.

[1912 S. 4029.]

Insurance (Marine)—Time Policy—"Perils of the seas"—Institute Time Clauses—"Inchmaree" Clause—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *Sched. I., r.* 12.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke causing the boiler to fall into the hold of the ship, damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached:—

Held, that the loss was not recoverable under the policy as it was not caused by a peril of the sea, nor was it within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the risks insured by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.

ACTION in the Commercial List tried by Pickford J. without a jury.

The plaintiffs claimed to recover a loss under a policy of marine insurance on the steamship *Ussa*, subscribed by the defendant and other underwriters. The policy was for twelve months from March 16, 1911, and was in the ordinary Lloyd's form, the perils insured against being "of the seas . . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . ship or any part thereof." The policy included "the conditions of the Institute Time Clauses as attached." Clause 3 was as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places and on all occasions . . . ." Clause 7 was as follows: "This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to, hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence

by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

The damage in respect of which the action was brought occurred on October 23, 1911, on which date the *Ussa* was lying in the Bramley Moor dock at Liverpool, and a boiler weighing about thirty tons was being lowered into the No. 4 hold of the *Ussa* from the steam crane *Atlas*, which had brought the boiler from another part of the dock. Owing to certain causes which are fully stated in the judgment the pin of the shackle attached to the rope, by which the boiler was being lowered, broke, and the boiler fell and damaged the hull.

Leslie Scott, K.C., and *Darby*, for the plaintiffs. First, the primary cause of the damage to the plaintiffs' ship was that the boiler was being loaded on to the ship from a water-borne crane, though it would have made no difference to the legal position if the crane had been on the quay. The accident was peculiar to a ship as such, and could not have occurred except on a ship. The loss was therefore due to a peril of the sea within the meaning of the policy. Perils of the sea are not confined to damage directly caused by water—*Gabay* v. *Lloyd* (1); *Lawrence* v. *Aberdein* (2)—but include all "damage of a character to which a marine adventure is subject"—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (3), per Lord Herschell—provided that the damage is due to some fortuitous cause: *The Xantho* (4); *Hamilton, Fraser & Co.* v. *Pandorf* (5); *Phillips* v. *Barber* (6); *Davidson* v. *Burnand.* (7)

Secondly, the loss is recoverable under clause 3 of the Institute Time Clauses. In the case of a time policy that clause is meaningless unless it be read as extending the perils insured against in the body of the policy. If the expression "perils of the seas" is to be construed in the limited sense for

(1) (1825) 3 B. & C. 793.
(2) (1821) 5 B. & Ald. 107.
(3) (1887) 12 App. Cas. 484, at p. 498.
(4) (1887) 12 App. Cas. 503.
(5) (1887) 12 App. Cas. 518.
(6) (1821) 5 B. & Ald. 161.
(7) (1868) L. R. 4 C. P. 117.

1913

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

which the defendants will contend, a dock risk is the very thing for which clause 3 is required, and if clause 3 be read into the policy the facts with regard to the defective pin of the shackle bring the case within the general words in the policy as applied to clause 3 : *Boehm* v. *Combe*. (1)

Lastly, the plaintiffs are in any event entitled to recover under clause 7, the Inchmaree clause. The clause must be read in conjunction with and as extended by the general words in the policy, and applying r. 12 of the Rules for Construction of Policy in the First Schedule to the Marine Insurance Act, 1906 (2), the words "all other perils" in the body of the policy cover perils similar in kind to those specifically mentioned in clause 7, and this loss was due to a cause which is analogous to the negligence of the crew or a latent defect in machinery. The judgment of Kennedy J. in *Jackson* v. *Mumford* (3) is no doubt opposed to this contention, but since the date of that decision the Marine Insurance Act, 1906, has been passed, and the effect of the above-mentioned r. 12 is that the judgment in *Jackson* v. *Mumford* (3) can no longer be regarded as containing a correct statement of the law.

Roche, K.C., and *F. D. Mackinnon*, for the defendant. The only ground on which it can be suggested that the loss was caused by a peril of the sea is that it happened on board ship. That is not enough. A peril of the sea is not the same thing as a peril on the sea. This accident could equally well have happened if the boiler had been loaded on to a railway truck; it is true that in that case the damage would have been different, but that is only because a railway truck is different

(1) (1813) 2 M. & S. 172.

(2) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 30:

"(1.) A policy may be in the form in the First Schedule to this Act.

"(2.) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them."

First Schedule. Rules for Construction of Policy.

"The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:— . . . . 12. The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy."

(3) (1902) 8 Com. Cas. 61.

from a ship. The distinction is well pointed out by Lord Bramwell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1), where he said: "But suppose the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship, as a ship, had anything to do." That applies exactly to the present case. None of the old cases cited carries the matter any further. The second contention of the plaintiffs is that the words "in port and at sea" &c. are not geographical expressions, but are descriptions of risks. That is a novel proposition and one for which there is no sort of authority, though the point, if a sound one, might have been, but was not, taken in *Jackson* v. *Mumford.* (2) As to the last point, it is impossible to insert clause 7 into the middle of the perils clause in the body of the policy so as to read the two as one clause. The context and collocation of the two clauses are such that they must be read separately. The law was laid down correctly by Kennedy J. in *Jackson* v. *Mumford* (2) and has been in no way altered by the Marine Insurance Act, 1906.

Leslie Scott, K.C., replied.

PICKFORD J. This case raises an important question on which there has been, I am told, a difference of opinion amongst eminent average adjusters. The action is brought to recover a loss under a policy of insurance in respect of damage occasioned to a ship. The policy was a time policy on the ship *Ussa* against the usual perils, commencing with perils of the seas, the enumeration of the perils being followed by the usual general words. At the foot of the policy were the words "Including the conditions of the Institute Time Clauses as attached." The question is whether the loss which happened comes within the terms of the policy. The *Ussa* was in the Bramley Moor dock at Liverpool and she was taking on board a boiler weighing about thirty tons from the steam crane *Atlas*,

(1) 12 App. Cas. at p. 493. (2) 8 Com. Cas. 61.

1913

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

Pickford J.

which had brought the boiler from the North Docks to the Bramley Moor dock. Whilst the boiler was in the act of being lowered by the crane into the ship's hold, it caught upon the coamings of the hatch, and this to a certain extent took the strain off the fall of the crane which was on board the *Atlas*. This caused the *Atlas* to list over away from the ship. The boiler then freed itself from the coamings and continued to descend, causing some extra strain upon the pin of the shackle attached to the rope, and in consequence the pin broke and the boiler fell to the bottom of the hold and damaged the hull.

The plaintiffs' case was launched upon the basis that the accident was due to some swell which caused the *Atlas* to list, but for which the boiler would not have caught the coamings; but on the evidence I am satisfied that that was not the cause of the accident, and that no motion of water had anything to do with the accident. Another question of fact which was raised was whether the pin and the shackle were in a proper condition. I do not think they were, and I think that that fact largely contributed to the accident.

In these circumstances the question is whether the plaintiffs are entitled to recover on the policy. The first point taken is that the damage was caused by a peril of the seas or by some other peril, loss, or misfortune of a similar description. I do not agree with that contention. I think the authorities shew that an accident of the kind I have described is not a peril of the sea. It is true that the boiler could not have caught upon the coamings unless there had been a ship into which it was being lowered, but the mere fact that the accident happened on board a ship does not make it an accident arising from a marine peril. Having regard to the decision of the House of Lords in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) I cannot hold that an accident, which might just as easily have happened if the crane had been on the quay and which was due to the boiler catching on the coamings and to the insufficiency of the pin and shackle, is caused by a peril of the sea or by a peril, loss, or misfortune of the same kind.

Then it is said that the plaintiffs can recover under the third

(1) 12 App. Cas. 484.

clause of the attached clauses. The argument is that, as the policy is a time policy, and it is therefore unnecessary to specify the time or place where the peril must occur in order to bring it within the policy, this clause must be read as an enlargement of the risks insured, because otherwise no meaning can be given to its words. It is true that on any construction the words "at sea" in this clause are surplusage, but I cannot read clause 3 as enlarging the risks. It does not in my opinion go further than saying that the insurance is against the perils mentioned in the body of the policy and is to extend to all the circumstances specified in clause 3.

Lastly, the plaintiffs rely on clause 7, which is well known under the name of the Inchmaree clause, and the contention is that the general words in the body of the policy must be read into that clause. It is admitted that the judgment of Kennedy J. in *Jackson* v. *Mumford* (1) is opposed to that contention. In that case Kennedy J. said: "I now come to the second contention of the plaintiff. I think that it may be dealt with very briefly. Mr. Scrutton argued that a connecting-rod is so closely akin to a shaft, or perhaps, rather, that the breakage of a connecting-rod is so closely akin to the breakage of a shaft, that applying the ejusdem generis principle and reading the special clause with the ordinary Lloyd's perils clause, so as to incorporate with the former the general or sweeping words 'all other perils, losses and misfortunes,' we ought to treat the breakage of a connecting-rod as a risk which like the 'breakage of shafts' is covered by the policy." The learned judge then dealt further with the argument and later on he says: "In this state of facts, I should hesitate, at any rate, to apply the ejusdem generis principle, as the application of that principle has now been authoritatively settled by the House of Lords in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2), even if I could incorporate the special in the general clause. But I do not think that I am entitled as a matter of construction to do this. This special clause, the Inchmaree clause, as it is frequently called, is a separate clause devised for addition to the ordinary Lloyd's policy in consequence of the House of Lords decision to

(1) 8 Com. Cas. at pp. 69, 70. (2) 12 App. Cas. 484.

1913

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

Pickford J.

which I have referred, and as its opening words, 'This insurance also specially to cover loss of' etc., shew, it is a special clause to cover certain particular risks which it proceeds to enumerate. I do not think I should be justified either in treating it simply as a part of the ordinary Lloyd's perils clause, which precedes it, or in adding to it from that clause the general and sweeping words. It does not appear to me to affect the question of construction that there is in the policy first, before the ordinary Lloyd's perils clause, a reference to this special clause in the words 'clauses as attached.'"

Two points are sought to be made with regard to that judgment, which though not technically binding on me I should not disregard without the strongest possible reasons. It is said that it was wrong as the law stood at the time when it was delivered. I do not think so. I think it was right as the law then stood and I agree with it. Next it is said that at any rate it is not in accordance with the law as it stands now, and reliance is placed on r. 12 in the First Schedule to the Marine Insurance Act, 1906, and s. 30 of the Act. Sect. 30 provides that "subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them," and r. 12 says that "The term 'all other perils' includes only perils similar in kind to the perils specially mentioned in the policy." I think that if Kennedy J. had had to decide *Jackson* v. *Mumford* (1) after the passing of the Act of 1906 he would by the reasoning of his judgment have said in the words of s. 30 that the context of the policy did "otherwise require," because the wording of the clause then in question, the language of which was the same as that of clause 7 in this policy, shewed that the general words in the body of the policy were not intended to apply to it. In the present case I do not think clause 7 can for the purpose of construction be treated as if it had been put in the body of the policy so as to attach to it the general words in the policy. I do not think that the law as stated by Kennedy J. in *Jackson* v. *Mumford* (1) has in any way been altered by the Marine Insurance Act, 1906, or

(1) 8 Com. Cas. 61.

by the rules made thereunder. For these reasons I am of opinion that the plaintiffs' claim fails and that there must be judgment for the defendant.

1913

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

Judgment for defendant.

Solicitors for plaintiffs: *Lightbound, Owen & MacIver.*
Solicitors for defendant: *Wm. A. Crump & Son.*

F. O. R.

THOMAS GABRIEL & SONS *v.* CHURCHILL & SIM.

[1912 G. 880.]

1913
Nov. 11, 13, 14

Principal and Agent—Sale of Goods—Broker receiving Del Credere Commission —Non-performance of Contract—Solvent Buyer—Liability of Broker.

A broker who on a sale of goods to an undisclosed buyer receives a del credere commission from the seller is not liable to pay the seller for the goods if the buyer is solvent but has refused to pay for the goods on the ground that the seller has not duly performed the contract. The broker is liable to pay the seller only if, owing to the insolvency of the buyer or some other analogous cause, the seller is unable to recover the price from the buyer.

ACTION in the commercial list tried by Pickford J. without a jury.

The plaintiffs claimed to recover from the defendants as del credere agents the sum of 177*l.* 8*s.* 9*d.*, the price of goods sold and delivered. The plaintiffs were timber merchants and the defendants were wood brokers. The defendants sold certain timber on behalf of the plaintiffs to an undisclosed principal. In respect of this sale the plaintiffs agreed to pay and paid to the defendants a del credere commission. The buyers were Millar's Karri and Jarrah Company, Limited, and their name was subsequently disclosed to the plaintiffs. The company, which was admitted to be perfectly solvent, for reasons which are fully stated in the judgment, refused to pay for a portion of the timber. The plaintiffs then brought this action against the defendants, alleging that by a custom in the timber trade where a merchant sells

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

timber through a broker to an unnamed principal, and the broker is paid a del credere commission by the seller, the broker is responsible for the due performance of the contract and for the payment of the bills on their due date, and that the liability of the broker is not limited to guaranteeing the solvency of the undisclosed principal.

The defendants denied the existence of the alleged custom, and denied that as del credere agents or otherwise they were personally liable to the plaintiffs. Evidence was called on both sides, and in the result Pickford J. held that the custom had not been proved.

Schiller, *K.C.*, and *D. M. Hogg*, for the plaintiffs. Apart from any custom of the trade, the acceptance by a broker of a del credere commission from the seller imposes on the broker in law an obligation to guarantee the due performance of the contract by the buyer, whether the buyer be insolvent or not, the broker being of course entitled to raise as a defence to the seller's action any grounds of defence that might be raised by the buyer. In *Grove* v. *Dubois* (1) Lord Mansfield said that a commission del credere "is an absolute engagement to the principal from the broker, and makes him liable in the first instance." It has no doubt been said in later cases that that statement of the law went too far, but only in saying that the liability of the agent was that of a principal. Lord Mansfield's statement as to the extent of a del credere agent's liability has never been questioned, and no case can be found in which it is laid down in terms that the liability is limited to a guarantee of the solvency of the buyer. In *Morris* v. *Cleasby* (2) Lord Ellenborough said that "the guarantor is to answer for the solvency of the vendee, and to pay the money if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good." There is nothing in that passage to justify the contention that the default of the vendee must be due to his insolvency and to no other cause. In *Couturier* v. *Hastie* (3) Parke B. in delivering the considered judgment of

(1) (1786) 1 T. R. 112, at p. 115. (2) (1816) 4 M. & S. 566, at p. 574.
(3) (1852) 8 Ex. 40, at p. 56.

the Court of Exchequer said that brokers "by reason of their charging a del credere commission" assume "responsibility for the solvency and performance of their contracts by their vendees." That passage was quoted with approval by Blackburn J. in *Fleet* v. *Murton* (1), in which case, it is to be observed, there was no question of the buyer's insolvency. Again, in *Ex parte White* (2) Mellish L.J. said that a del credere agent "guarantees that those persons to whom he sells shall perform the contracts which he makes with them." The plaintiffs are, therefore, entitled to recover in this action.

George Wallace, K.C., and *Chaytor*, for the defendants. A del credere agent only becomes liable to the vendor in the case of the non-performance of the contract owing to the buyer's insolvency. *Grove* v. *Dubois* (3) is not good law, and was disapproved of in *Morris* v. *Cleasby* (4) and in *Hornby* v. *Lacy*. (5) In the latter case Lord Ellenborough said that a commission del credere "imports, that if the vendee does not pay, the factor will: it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency." In *Couturier* v. *Hastie* (6) the Court adopted the opinion of the New York judge Cowen J. in *Wolff* v. *Koppel* (7) that Lord Mansfield's view in *Grove* v. *Dubois* (3) was no longer correct. With the single exception of the passage cited from the judgment of Mellish L.J. in *Ex parte White* (8), which was merely an obiter dictum, the performance of the contract is always coupled with the buyer's insolvency which is the essential condition of the liability of the del credere broker. If the broker absolutely guarantees the performance of the contract, there would be no necessity for referring to the buyer's insolvency, but, as even an insolvent buyer might perform the contract, it is necessary to mention both insolvency and non-performance as the conditions of the broker's liability. This limitation is founded on good sense. The question of solvency

(1) (1871) L. R. 7 Q. B. 126, at p. 132.
(2) (1871) L. R. 6 Ch. 397, at p. 403.
(3) 1 T. R. 112.
(4) 4 M. & S. at p. 575.
(5) (1817) 6 M. & S. 166, at p. 171.
(6) 8 Ex. 40.
(7) (1845) 5 Hill, 458; 8 Ex. 56, n.
(8) L. R. 6 Ch. at p. 403.

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

or insolvency is a fact which can be proved, but the broker is not in a position to know or to prove that the buyer has a good defence to an action for the price of the goods. No instance can be found in the last hundred years in which a del credere broker has been held liable for the buyer's non-performance where the buyer was solvent. If the broker were liable he would not have a right of action over against the buyer: *Bramwell* v. *Spiller*. (1)

Schiller, K.C., in reply. *Bramwell* v. *Spiller* (1) only decided that a del credere agent could not sue the buyer in his own name, but the agent could compel the seller to sue the buyer on the agent's giving the former an indemnity as to costs: *Wright* v. *Simpson*. (2) [He also referred to *Wickham* v. *Wickham* (3); *Ex parte Bright* (4); *Pike* v. *Ongley* (5); Halsbury's Laws of England, vol. i., p. 153; Colyar on Guarantees, 3rd ed. p. 149; Bowstead on Agency, 5th ed. p. 164.]

PICKFORD J. The claim in this action is against the defendants as del credere brokers. The plaintiffs are timber merchants and the defendants are wood brokers, and the action arises out of a sale of timber made by the defendants as brokers for the plaintiffs. The name of the purchaser was not at the time of the sale disclosed to the plaintiffs, but the purchaser was in fact Millar's Karri and Jarrah Company, Limited, a company of unimpeachable solvency. The defendants gave the plaintiffs a sold note, which was in the following terms: "Sold for account of Messrs. Thomas Gabriel & Sons to our principals about 380 loads Blackbutt scantlings as per specification at foot at two shillings and nine pence per foot cube. Cost freight and insurance to London. Delivery as soon as possible and to follow on after delivery of 2000 setts contract 7th February 1907. To be paid for by nett cash on arrival of each shipment. Any question arising under this contract which cannot be settled by the brokers hereto shall then be submitted to arbitration in the usual manner. (Signed) Churchill & Sim, Brokers. The

(1) (1870) 21 L. T. 672.
(2) (1802) 6 Ves. 714, at p. 733.
(3) (1855) 2 K & J. 478.
(4) (1879) 10 Ch. D. 566.
(5) (1887) 18 Q. B. D. 708.

goods to be at buyer's risk in respect of fire directly they leave the ship's deck. Brokerage and guarantee 2½ per cent." The bought note was in these words: "Sold to Messrs. Millar's Karri and Jarrah Company (1902), Limited, for account of our principals." Then followed the same description of the goods and the same terms as in the sold note, except that the bought note said "Brokerage ½ per cent." The notes did not disclose to the plaintiffs the name of the buyers, nor did they disclose to Millar's Karri and Jarrah Company the name of the sellers. The defendants took the brokerage and guarantee, or what is called a del credere commission, from the plaintiffs in respect of the transaction. The plaintiffs got into default in delivering under the contract, and it was arranged that they should pay a sum of 200*l.* in respect of claims arising out of that delay, and it was also arranged that the plaintiffs would deliver, and the buyers would accept, the balance of the timber under a penalty of 250*l.* to be paid by the plaintiffs if they did not deliver the balance on March 1, 1911, the contract having been made in 1908. The contract was varied to that extent and became a contract by which the plaintiffs agreed to deliver the balance of the goods and agreed to pay a penalty if they were not delivered by March 1, 1911. The timber was not all delivered by March 1, 1911, and the buyers declined to pay to the extent of 250*l.*, because they said they were entitled as against the price that might be due for the goods to set off 250*l.* which was owing by the plaintiffs under the contract as altered. That dispute having arisen and the names of the buyers being by that time known to the plaintiffs, the buyers were willing to have the matter settled either by arbitration or by the submission of a case for the opinion of counsel or of some person of standing in the trade. The plaintiffs declined to agree to that unless the brokers, the defendants, were made parties to the arbitration or the case. The defendants took up the position, which they still adhere to, that they were not personally liable to the plaintiffs in respect of the performance of the contract; thereupon the plaintiffs brought this action against them.

The plaintiffs contend that a person in the position of a del

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

Pickford J.

credere agent can be sued for the price of the goods although the purchaser is solvent, and although there is a bona fide dispute between the buyers and the seller as to the amount that is payable, so that there is either no sum due or no debt ascertained. They say that they have that right, whatever the nature of the dispute. The buyers may be saying that the goods were not according to the description in the contract and that they are entitled to reject the whole of the goods tendered, or that they are entitled to a reduction of price in consequence of deficiency in quality, or, as in this case, that they are entitled to set off a claim against the sellers arising out of the same contract. The plaintiffs say that in all these cases they are entitled, when the contract date for payment has passed, to sue the del credere brokers for the price, the brokers being entitled to set up against the claim for the price all the defences which would be open to the buyers if they were sued, that is to say, that in the present case the brokers would be entitled to set up the right to deduct the 250*l.*, and that in the other cases which I have mentioned they would be entitled to set up the right to reject or the right to claim a diminution of price in consequence of deficiency in quality; in other words, that the sellers are not only entitled to call upon the del credere brokers to pay an ascertained sum of money which the buyer has not paid, but that the sellers are also entitled to call upon the brokers to litigate any dispute that may have arisen between the sellers and the buyers. It is said that in the present case the 250*l.* which the plaintiffs agreed to pay the buyers was unquestionably a penalty and not liquidated damages, and that the buyers in fact suffered no damage through the delay in delivery. That question is not before me, nor do I think it is of importance. The question which I have to decide is one of principle whether the seller is entitled to call upon the del credere broker to litigate any disputes that may have arisen between the seller and the buyer, and not only to pay an ascertained sum which the buyer has refused to pay, but also to ascertain by setting up the buyer's defences how much is to be paid. In substance the plaintiffs claim a right to make the brokers personally liable upon the contract, not exclusively, but co-ordinately with the

buyers, thus giving the sellers the right to sue either the brokers or the buyers as they think fit. It is said that this right arises in law out of the position of the defendants as brokers receiving a del credere commission, and, if not, that there is a custom of the timber trade which gives that right. I will first deal with the alleged custom. Several witnesses were called for the plaintiffs, but I have considerable doubts whether they gave any real evidence of the existence of the alleged custom. I am inclined to think that the gist of their evidence was that in their opinion the legal position and obligations of a del credere agent were such as they stated in their evidence. No such case as this has ever been known to any of the witnesses on either side. Disputes as to these matters have of course arisen, and always will arise, between buyer and seller, and arbitrations have been held, but in no single instance has the broker ever been made a party to the arbitration. Assuming, however, that some evidence of the existence of the custom was given by the plaintiffs' witnesses, a number of persons of equal standing and position in the timber trade have given evidence on the other side, and they say that there is no such custom. The conclusion I have come to on this question of fact is that the existence of the alleged custom has not been proved.

Then the question arises as a matter of law, Does the fact that a broker takes a del credere commission make him personally liable on the contract, or does it, as Mr. Schiller preferred to put it, make him guarantee the performance of a contract in the sense that he may be sued for the money due, or alleged to be due, upon the contract, with the right to set up all the buyer's defences to shew that it was not due? I cannot myself distinguish that from being personally liable on the contract, but that was the way in which it was put before me. Various definitions were given to me of a del credere agent. The first was from Story on Agency. In s. 33 he says: "The phrase del credere is borrowed from the Italian language, in which its signification is exactly equivalent to our word, guaranty or warranty." I do not think that that carries us very much further, but in s. 215 he also deals with the question, and says: "The most important"—that is, the most important of the duties and obligations—"in a practical view, to be here taken notice of, is, the contract of guaranty

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

Pickford J.

by a factor, arising from the receipt of what is commonly called a del credere commission (the nature whereof has been already stated), by which he, in effect, becomes liable, in the case of a sale of goods, to pay to his principal the amount of the purchase-money, if the buyer fails to pay it, when it becomes due." It will be noticed that that does not suggest any right to litigate with the agent the question of whether the money is due or not, but says that the agent's obligation is to pay the money when it becomes due. The associate has kindly given me another definition—I am not sure whether it is from an English or a foreign jurist: "Del credere, meaning trust and faith to be responsible for the payment of goods and bills. Also the premium or price for this surety or guarantee."

Those definitions are no doubt not conclusive, and, therefore, I have to look and see whether the authorities establish that such a contract does impose a liability to be sued upon the contract. I use that expression because I think that that is what it comes to. At one time the Courts did hold that that was so. In the case of *Grove* v. *Dubois* (1) it does seem to have been the opinion of the Court. That case is referred to in a note to s. 33 of Story on Agency, where it is stated that: "The doctrine of that case on this point seems incorrect. A factor, with a del credere commission, is liable to the principal, if the buyer fails to pay, or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name, notwithstanding the del credere commission; so that the latter amounts to no more than a guaranty." That note seems to be correct, at any rate it is correct in saying that the case of *Grove* v. *Dubois* (1) has been disapproved of and is not the law. The first case in which it was considered was *Morris* v. *Cleasby* (2), where Lord Ellenborough in delivering judgment said (3): "With all the respect which is due to Lord Mansfield and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce

(1) 1 T. R. 112.

(2) 4 M. & S. 566.

(3) 4 M. & S. at p. 574.

uncertainty and confusion into the law on this subject. The laxity of practice mentioned by Buller J. in *Grove* v. *Dubois* (1) " —that was a practice that Buller J. said he had often seen adopted in cases at the Guildhall, namely, to sue the del credere brokers as though they were the principals—"may have prevailed, as in the case of a foreign buyer the broker is most probably the agent of the buyer, and the principal is seldom enquired after. But such practice cannot alter the legal rights of parties arising on the instrument or terms of their contract. The principal must always be debtor, and that, whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable." That was followed in *Hornby* v. *Lacy*. (2) Those cases, therefore, dispose of the opinion expressed in *Grove* v. *Dubois* (1) that the del credere broker was personally liable on the contract. But the matter was considered afterwards in the well-known case of *Couturier* v. *Hastie* (3), in the judgments in which there are expressions which were relied upon by Mr. Schiller as shewing that there was the obligation to guarantee the performance of, that is to say really, a liability to be sued upon, the contract which *Morris* v. *Cleasby* (4) and *Hornby* v. *Lacy* (2) had decided not to exist. Now one thing is perfectly clear, and that is that the judges who decided *Couturier* v. *Hastie* (3) had no intention whatever of interfering with the decisions in *Morris* v. *Cleasby* (4) and *Hornby* v. *Lacy*. (2) They were cited to them specifically, and they were cited to them as cases which disposed of the doctrine laid down in *Grove* v. *Dubois*. (1) They were cited in order to shew that the del credere contract was one of guarantee which ought to be in writing. The conclusion sought to be drawn from them was not adopted by the Court, but the authority of the cases was not in any way, it seems to me, touched by the decision, and if the judges who delivered a considered judgment in that case had intended to throw any doubt upon those decisions I think they would have been dealt with and the reasons for it would have been given. But when the case of *Couturier* v. *Hastie* (3) is looked at I do not think

(1) 1 T. R. 112.
(2) 6 M. & S. 166.
(3) 8 Ex. 40.
(4) 4 M. & S. 566.

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

Pickford J.

that it lends any support to the argument that the del credere broker can be sued as a principal upon the contract. The Court expressly approved the judgment and the reasoning of an American judge, Cowen J., in *Wolff* v. *Koppel* (1), which is reported in the note to the case of *Couturier* v. *Hastie* (2), and in that case the learned judge, Cowen J., considers what the position of a del credere agent is and how the del credere commission arises. He said, referring to *Morris* v. *Cleasby* (3): "That case certainly defines the liability of the factor somewhat differently from what several previous cases seem to have done. The effect of acting under the commission is said to be, that the factor becomes a guarantor of the debts which are created, that is to say, they are debts due to the merchant, and the factor's engagement is secondary and collateral, depending on the fault of the debtors, who must first be sought out and called upon by the merchant." He referred to *Hornby* v. *Lacy* (4) and other cases, and, after referring to a case decided in the Supreme Court of Massachusetts, he said that the judges in that case "considered the obligation as a guaranty. But a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shewn" —that is, a factor without a del credere commission. "He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation; and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying

(1) 5 Hill, 458; 8 Ex. 56, n.
(2) 8 Ex. 40.
(3) 4 M. & S. 566.
(4) 6 M. & S. 166.

cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee the debt falls absolutely on the factor." That seems to me to be just the same doctrine as was laid down in *Morris* v. *Cleasby* (1), which is expressly approved by this learned judge, and that reasoning is adopted by Parke B. in delivering the judgment of the Court of Exchequer in *Couturier* v. *Hastie.* (2) He says: "We entirely adopt the reasoning of an American judge (Cowen J.) in a very able judgment on this very point." Then the learned judge himself, in delivering the judgment of the Court of Exchequer, uses language which is almost the same. He says this: "A higher reward is paid in consideration of their"—that is, the del credere brokers—"taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees." Mr. Schiller naturally relied on the words "the solvency and performance." He contends that Parke B. would not have mentioned "and performance" if it was only solvency, and that that really shews that the learned judges who decided *Couturier* v. *Hastie* (2) meant to say that a del credere broker is responsible for the performance of the contract in this sense, that whatever disputes there might be with regard to the matter he is liable to be sued, but he can set up the buyer's rights in the dispute. I do not think that Parke B. had any intention of saying anything of that sort. It certainly is quite contrary to the reasoning of Cowen J. of which he expressly approved. That case so far as I know has never been doubted, and is always cited with regard to this question of del credere agents; but there are other cases which were cited to me by Mr. Schiller. One was the case of *Fleet* v. *Murton* (3), in which Blackburn J., in considering the position of a del credere

(1) 4 M. & S. 566. (2) 8 Ex. at p. 56.
(3) L. R. 7 Q. B. 126, at p. 132.

1913

THOMAS GABRIEL & SONS v. CHURCHILL & SIM.

Pickford J.

agent—a question, however, which was not necessary for the decision in that case—quoted with approval the language of Parke B. in *Couturier* v. *Hastie* (1) as to del credere agents being responsible "for the solvency and performance of their contracts by their vendees." Another case referred to was *Ex parte White* (2), in which Mellish L.J. used wide language of the same description. He also was not considering the position of a del credere agent at all; the observation relied on was merely incidental to his judgment, which was on a different point altogether. When those learned judges used those expressions it is quite clear that this question was not before them, and that they were not intending to lay down the principle that a del credere broker is responsible for the performance of the contract by the buyer in the sense of being personally liable on the contract. They only meant that the del credere broker was responsible for the performance in the ordinary accepted sense, according to *Morris* v. *Cleasby* (1), that if there was a real ascertained debt due to the seller and the buyer could not pay it the del credere broker would have to pay it on the insolvency at any rate of the buyer. I cannot think that those expressions were at all intended to extend the obligation of a del credere broker as defined in the earlier case of *Morris* v. *Cleasby* (3), and also, in my opinion, in *Couturier* v. *Hastie*. (1) I do not think that any of these cases affords any ground for the contention set up by the plaintiffs in this case, that where there is a contract effected through a del credere broker, if disputes arise between the seller and the buyer, the seller is entitled to call on the del credere broker to litigate those disputes, taking upon himself all the obligations of the buyer and taking to himself all the defences of the buyer. I do not think that these cases lend any countenance to any such contention, or that that is the obligation of a del credere broker. It is not necessary for me to decide in this case whether the obligation is confined solely to the question of solvency and insolvency, or whether it would extend to the kind of case where the buyer was in fact quite solvent, but was in some distant part of the world under such circumstances that his

(1) 8 Ex. at p. 56. (2) L. R. 6 Ch. 397.
(3) 4 M. & S. 566.

assets could not be got at by the seller in order to satisfy the debt. I do not think it is necessary to decide whether it would extend to that or not, but I think it is quite clear that it does not extend to make him the person with whom the seller is entitled if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. I think that, according to the authorities, it cannot extend further than that where there is an ascertained amount or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission. I certainly do not think that the obligation extends to anything like the claim which has been made in this case. For those reasons I am of opinion that the plaintiffs' claim fails, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs : *Drake, Son & Parton.*

Solicitors for defendants : *Coward & Hawksley, Sons & Chance.*

F. O. R.

1913
Nov. 20.

VICKERSON, Appellant *v.* CROWE, Respondent.

Merchant Shipping—Persuading Seaman to desert—Articles not signed—"His ship"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 236.

By s. 113 of the Merchant Shipping Act, 1894, the master of every ship, except as therein mentioned, shall enter into an agreement with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom. By s. 114 the agreement is to be in the form approved by the Board of Trade and is to be dated and signed as therein directed.

By s. 236 of the Act, if a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, he shall be liable to a penalty.

A seaman was engaged to serve as a seaman on a British ship. After he was so engaged, but before he had signed any agreement under s. 113 of the Act, a person attempted to persuade him to refuse to join the ship:—

Held, that the person could properly be convicted of attempting to persuade the seaman to refuse to join "his ship" although at the time of the attempt no agreement had been signed.

Case stated by a stipendiary magistrate.

On June 10, 1913, the appellant George Vickerson appeared before the magistrate sitting as a Court of summary jurisdiction on an information laid by one William Crowe for that the appellant did on May 23, 1913, unlawfully attempt to persuade one William Crowe, a seaman, to neglect or refuse to join his ship, to wit, a certain British steamship called the *Japanese Prince*, contrary to the provisions of the Merchant Shipping Act, 1894, s. 236, sub-s. 1.

The magistrate convicted the appellant and fined him 5*l.* and further ordered him to pay the sum of 1*l.* 9*s.* 6*d.* costs, but stated a case as follows:—

By s. 236, sub-s. 1, of the Merchant Shipping Act, 1894, it is enacted that if a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding 10*l.*

1913

VICKERSON v. CROWE.

By s. 113, sub-s. 1, of the Merchant Shipping Act, 1894, the master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom.

Sects. 113, 114, and 115 of the said Act lay down the forms, periods, and conditions of such agreements and the penalties to which the master is liable for non-compliance therewith.

Such agreements are commonly described as articles, and the master of the *Japanese Prince* was not exempt as a coasting trader from the duty imposed upon him by the aforesaid s. 113, sub-s. 1, of the Merchant Shipping Act, 1894.

The following facts were proved in evidence before the magistrate :—

William Crowe was engaged at Whitby to serve as a seaman on board the British steamship *Japanese Prince* by the agent of the said steamship, who having examined his discharge book expressed himself satisfied therewith and ordered Crowe to go to Middlesbrough, having advanced his railway fare on orders received from the owners of the said steamship. On May 22, 1913, Crowe went on board the *Japanese Prince* at Middlesbrough and his discharge book was taken and kept by an officer of that steamer.

On May 23, 1913, Crowe having been ordered by an officer of the said steamship to go to the Board of Trade offices for the purpose of signing articles left the *Japanese Prince* with the object of so doing.

Outside the Board of Trade offices the appellant accosted Crowe, and, having informed him amongst other things that he would be a "blackleg" if he proceeded to sea on board the *Japanese Prince*, attempted to persuade him to refuse to go to sea on board the said steamship.

Crowe subsequently signed the articles and received and cashed an advance note, but in consequence of the appellant's conduct he did not proceed to sea but remained on shore,

1913

VICKERSON v. CROWE.

leaving his discharge book and kit on board the *Japanese Prince*.

There was no evidence called to shew that the appellant had any conversation with Crowe subsequently to his having signed the articles.

Crowe considered himself engaged as a seaman on board the *Japanese Prince* on May 22, and he was prevented from sailing by the persuasion of the appellant.

Upon these facts the magistrate held that the *Japanese Prince* was Crowe's ship within the meaning of s. 236, sub-s. 1, of the Merchant Shipping Act, 1894.

It was contended on behalf of the appellant that the *Japanese Prince* could not in law be regarded as Crowe's ship, inasmuch as Crowe had not signed articles at the time when the appellant attempted to persuade him from returning on board the *Japanese Prince*, and that the magistrate's finding that the said ship was Crowe's ship was consequently wrong in law.

The question for the opinion of the Court was whether the contention of the appellant was correct; if so the conviction together with the penalties aforesaid was to be quashed; otherwise it was to stand.

Amongst other cases cited were *Austin* v. *Olsen* (1) and *Thomson* v. *Hart*. (2)

Hemmerde, K.C., and *Clement Edwards*, for the appellant. A seaman cannot be said to desert, or refuse to join, "his ship" until he has signed the agreement prescribed by s. 113 and the following sections of the Merchant Shipping Act, 1894. It may be that an informality is not enough to invalidate an otherwise binding agreement, as in *Austin* v. *Olsen*. (1) In *Thomson* v. *Hart* (2) the person persuaded was a storekeeper and was really acting in continuation of an old agreement duly signed. Here the only agreement is one which must be in writing and signed. Until that is done the seaman has no ship which can be called "his ship."

[ATKIN J. referred to *In re Great Eastern Steamship Co.* (3)]

(1) (1868) L. R. 3 Q. B. 208; 37 L. J. (M.C.) 34.

(2) (1890) 18 R. (Just. Cas.) 3; 28 S. L. R. 28.

(3) (1885) 53 L. T. 594.

1913

VICKERSON v. CROWE.

It is expressly provided by s. 155 that a seaman's right to wages shall be taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens.

W. R. Briggs (*A. Neilson* with him) was not heard.

DARLING J. The question in this case turns on the meaning of two words in s. 236 of the Merchant Shipping Act, 1894, namely, the words "his ship." The appellant contends that although he did persuade Crowe to leave a ship, the *Japanese Prince*, yet he committed no offence because the *Japanese Prince* was not "his"—i.e., Crowe's—"ship." The findings in the case are that Crowe was engaged at Whitby; was ordered to go, and went, on board the ship at Middlesbrough, where his discharge book was handed over to the ship's officer; and was ordered next day to go, and went, to the Board of Trade offices to sign articles. These findings shew that he was receiving and acting on orders given by the officers of the ship. He considered himself engaged as a seaman on board the ship. In my opinion the magistrate was right in holding that the *Japanese Prince* was Crowe's ship; it had become his ship in the sense that he belonged to the ship. He had put himself in a position in which he could have maintained an action for breach of contract if the shipowners had refused to allow him to go on board. It is true that by s. 113 and the following sections of the Merchant Shipping Act, 1894, the master of a ship must, with some exceptions not material in this case, enter into an agreement in the form approved by the Board of Trade with every seaman whom he carries to sea as one of his crew. The execution of this agreement may be a condition precedent to carrying a seaman to sea, but it is not a condition precedent to engaging him as a seaman and constituting him one of a ship's crew. If after engaging him the shipowners had broken their engagement with him, Crowe could in my view have brought an action against them even before the agreement had been signed. For these reasons I think that the *Japanese Prince* was "his ship" and that the appellant was properly convicted of an offence under s. 236 of the Act. The appeal must be dismissed.

1913

VICKERSON v. CROWE.

ROWLATT J. I am of the same opinion. I do not think this conviction ought to be supported on the ground that the magistrate has found that the appellant incited the seaman before signing to refuse to join his ship after signing the agreement. That brings me to the question of law. In the case of a seaman who has not yet signed articles, but who has made a contract to serve as a seaman on board a ship and has begun his service on the ship, can it be said that the ship is "his ship"? Can this relation between seaman and ship be constituted without articles? In ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom articles are not necessary. In that case the relation can be and is constituted without articles. It is said that in other cases there can be no such relation without articles. I do not assent. Articles are only necessary before the master carries the seaman to sea as one of his crew from any port in the United Kingdom. In my opinion this point has been decided by Chitty J. in *In re Great Eastern Steamship Co.* (1); but even apart from that authority I think the magistrate came to the right decision in this case.

ATKIN J. I agree. On the facts found I am of opinion that the *Japanese Prince* was Crowe's ship. He was engaged as a seaman on the ship on May 22, and he considered himself a seaman on that ship; that is proved by his going in obedience to orders on board the ship at Middlesbrough and there giving up to the ship's officer his discharge book; he remained on the ship till next day. Then, again in obedience to orders, he went to the Board of Trade offices to sign the articles. Before signing he had a conversation with the appellant. If the appellant then persuaded him not to join the *Japanese Prince* he persuaded him not to join his ship, and the magistrate was right in convicting him under s. 236. That there can be such an engagement before articles are signed the case of *In re Great Eastern Steamship Co.* (1) is a direct authority. In that case the captain of a ship had in the month of December, 1884, engaged several seamen to go on a voyage. The ship had to

(1) 53 L. T. 594.

undergo repairs and did not sail. The men served on the vessel for some weeks, and on February 3 they were discharged without having been paid their wages up to that date. In the winding up of the company these seamen claimed to enforce their maritime lien and to be paid their wages in priority to the holders of debentures of the company. The point was made that no articles had been signed and that therefore the wages could not be claimed. Chitty J. in overruling this point said (1): "I think there is nothing in the statute"—i.e., the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 149, corresponding to s. 113 of the Act of 1894—"which avoids the agreement which was come to, as I hold, in point of fact, between the master on the one hand and the seamen on the other; and that it was not necessary for the purpose of the question that I have to decide that the agreement should be in writing," in other words that articles should be signed. Accordingly the learned judge allowed the seamen their wages up to the time when they were discharged and gave effect to their lien in priority to all other mortgages and charges whatsoever. That is a direct authority justifying the magistrate in deciding that the *Japanese Prince* was Crowe's ship even before he had signed articles. If the law were otherwise it might in certain events bear with extreme hardship on a seaman who for one reason or another had not signed any agreement.

It is not necessary to decide more in this case; but I wish to leave open the question whether a man could be convicted who, before any agreement had been made, should say to a seaman "Sign your articles or sign them not, as you please: but whether you sign them or not, by no means go to sea." I desire also to add that there is no evidence that the appellant was privy to the acts of the seaman in cashing his advance note and then refusing to proceed to sea.

Appeal dismissed.

Solicitors for appellant: *Alexander Smith & Co.*

Solicitors for respondent: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

(1) 53 L. T. at p. 596.

W. H. G.

1913
Nov. 6, 13;
Dec. 8.

WERNHAM *v.* THE KING.

Licensing Acts—Compensation Levy—"Old on licence"—Forfeiture—Grant to Assignee at Special Sessions—"Transfer"—"Licence in force on August 15, 1904"—*Alehouse Act,* 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Licensing Act,* 1874 (37 *& 38 Vict. c.* 49), *s.* 15—*Licensing (Consolidation) Act,* 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 24), *ss.* 21, 23; *Sched. II., Part I.*

By s. 21 of the Licensing (Consolidation) Act, 1910, the compensation authority shall (except as therein mentioned) impose in respect of all old on licences renewed in respect of premises within their area charges at rates therein specified, to be levied and paid as part of the duties on the corresponding excise licence.

By s. 23, sub-s. 1, a transfer of a justices' licence is the grant of a justices' licence to one person in substitution for another person who holds or has held the licence. By sub-s. 2 (*a*) a transfer can only be authorized in the cases and to the persons mentioned in Sched. IV. to the Act, including the case where the owner of licensed premises or some person on his behalf on the forfeiture of the licence has obtained temporary authority to carry on business until the next transfer sessions and applies for a transfer at those sessions; in which case the transfer may be granted to the owner or any person applying on his behalf, as if the licence to be transferred were, notwithstanding forfeiture, still valid.

In Sched. II., Part I., to the Act "old on licences" are described as "justices' on licences which were in force on August 15, 1904, including (*a*) licences granted by way of renewal of a licence so in force . . . . whether the licence continues to be held by the same person or has been . . . . transferred to any other person or persons."

The suppliant was since 1911 the holder of a licence in respect of a certain house and thereby authorized to sell intoxicating liquors for consumption either on or off the premises. A licence in respect of the same house granted before 1904 had been renewed year by year, and a renewed licence was in force on July 18, 1907. On that date the then holder was convicted of felony. The owners of the house through their agent applied for and obtained under s. 15 of the Licensing Act, 1874, and s. 14 of the Alehouse Act, 1828, authority to carry on the business until the next special sessions. On application to those sessions a licence was granted to the owners' agent which remained in force until the next general annual licensing meeting, at which the owners' agent was granted, by way of renewal of the licence then held by him, a licence which had been continuously renewed until it was transferred on June 26, 1911, to the suppliant.

In January, 1911, the compensation authority acting under s. 21 of the Licensing (Consolidation) Act, 1910, imposed a compensation levy

in respect of all old on licences renewed within their area. In respect of this levy the Excise officer demanded of the suppliant, who under protest paid, the sum of 20*l*. The suppliant claimed to recover this sum on the ground that the forfeiture in 1907 prevented his licence from being one which was in force on August 15, 1904, within the meaning of Sched. II., Part I., and therefore from being an "old on licence" within the meaning of s. 21:—

Held, that the authority and licence granted to the owners' agent in 1907 were a transfer within the meaning of the Licensing Act, 1904, and were therefore a "transfer" within the meaning of s. 23 of the Act of 1910; that the licence had been "transferred" to the owners' agent within the meaning of Sched. II., Part I., and that it was therefore in force on August 15, 1904, within the meaning of that enactment; and that the levy was properly made.

Freer v. *Murray* [1894] A. C. 576, and *Tower Justices* v. *Chambers* [1904] 2 K. B. 903, discussed.

HEARING of a petition of right before Bailhache J. without a jury.

A special case was stated as follows:—

"1. The suppliant James William Wernham is now and has been since June 26, 1911, the holder of a victualler's licence in respect of the 'Prince Albert' public-house, 21, Brushfield Street, Shoreditch, in the county of London, under which licence he is licensed to sell at the said premises all kinds of intoxicating liquors by retail for consumption either 'on' or 'off' the said premises.

"2. The said licence was transferred to the suppliant by the licensing justices of the Tower Division of the said county on June 26, 1911. An extract from the register of licences of the said division certified by the clerk to the said justices is printed in the appendix hereto and numbered 1. The 'Prince Albert' public-house is a fully-licensed public-house within the meaning of Part II. of the Finance (1909-10) Act, 1910, and the suppliant is liable for certain duties of excise in respect of the said licence payable to the collector of Customs and Excise at 122, Minories, London, E., on behalf of the Commissioners of Customs and Excise.

"3. The compensation authority for the county of London in pursuance of the Licensing (Consolidation) Act, 1910, s. 21 (1),

(1) See note on p. 487, post.

1913

WERNHAM v. REX.

in the month of January, 1911, imposed in respect of all 'old on licences' within the meaning of the said s. 21 which should be renewed by the justices of the licensing divisions of the said county charges at the maximum rate of charge as specified in the scale of maximum charges for compensation levy in the First Part of the Third Schedule to the Licensing (Consolidation) Act, 1910. In November, 1911, there became payable by the suppliant a sum in respect of his said victualler's licence of 65*l.*, being the duty of excise chargeable under the Finance (1909-10) Act, 1910, and there was also demanded by the said collector of Customs a sum of 20*l.* in respect of the said maximum charge for compensation levy upon the said 'Prince Albert' public-house, which said sum of 20*l.* was calculated in respect of the said public-house under the Third Schedule, Part I., of the Licensing (Consolidation) Act, 1910. The letter demanding the said sums is printed in the appendix hereto and numbered 2.

"4. After certain correspondence between the suppliant's solicitors, Messrs. Crossman, Prichard, Crossman & Block, of 16, Theobalds Road, Gray's Inn, W.C., and the said collector of Customs and Excise (not material to the questions of law arising herein), the suppliant paid under protest the said sum of 20*l.* mentioned in paragraph 3 hereof on April 3, 1912, to the said collector, requesting that the said amount be 'retained on deposit' pending the decision upon the questions of law arising upon this special case, and the Commissioners of Customs and Excise received the said sum of 20*l.* and 'retain it on deposit' pending the said decision. The suppliant contends that no sum is due and payable by him or can be lawfully demanded from him in respect of the said public-house in respect of compensation levy and that the licence of the 'Prince Albert' held by him is not an old 'on licence' within the meaning of s. 21 of the Licensing (Consolidation) Act, 1910, and that he is entitled to recover the said sum of 20*l.* so paid by him as aforesaid.

"5. The facts upon which the said contentions last mentioned are founded are as follows:—

"As appears by appendix I. one Stephen Morgan was on July 18, 1907, whilst duly licensed in respect of the premises,

convicted for the first time of felony within the meaning of s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), of s. 7 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), of s. 22 of the Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), and of s. 14 of the Wine and Beerhouse Act, 1870 (33 & 34 Vict. c. 29), and thereupon became personally disqualified from holding a licence. On August 13, 1907, the owners of the said premises, Messrs. Watney, Combe, Reid & Co., Limited, by their secretary caused application to be made to the metropolitan police magistrate sitting as a Court of summary jurisdiction at the Old Street Police Court, and such magistrate under s. 15 of the Licensing Act, 1874, and in pursuance of that section granted authority to Samuel Jacobs (the representative of the said owners) to carry on upon the said premises until the next special sessions for licensing purposes the business which had previously to such conviction of the said Stephen Morgan been carried on there by him. On September 6, 1907, a notice was served by or on behalf of the said owners and the said Samuel Jacobs on the clerk to the licensing justices for the Tower Division of their intention to apply at the next special sessions for a licence for the premises. At the special or transfer sessions held on September 30, 1907 (being the next special sessions after the said conviction), the justices upon such application as aforesaid granted pursuant to s. 15 of the Licensing Act, 1874, and the Acts amending the same to the said Samuel Jacobs a licence which was to remain in force until April 5 then next ensuing (that is to say, until April 5, 1908, on which day the justices' licence granted to the said Stephen Morgan at the general annual licensing meeting held in February, 1907, would have in the ordinary course expired) authorizing him to apply for and hold any of the excise licences that might be held by a publican for the sale by retail at the 'Prince Albert' aforesaid of intoxicating liquor to be consumed either on or off the premises.

"At the next general annual licensing meeting holden in the month of February, 1908, the licensing justices for the division granted to the said Samuel Jacobs by way of renewal of the said licence granted by the special sessions as aforesaid an ordinary

1913

WERNHAM v. REX.

justices' licence for the 'Prince Albert' to be in force from April 5, 1908, to April 5, 1909, and from that date to the present time such licence has been renewed by the said Tower justices to successive occupiers including the suppliant.

"The said house was closed on July 18, 1907, upon the said conviction, but it was reopened four weeks afterwards on August 15, 1907, under the said authority of the said magistrate and thereafter remained open.

"It has not been possible to obtain any copy of the licence held by the said Stephen Morgan or of the said licences granted to the said Samuel Jacobs or of the said notice of application to the special sessions, but a copy of the licence held by the suppliant in respect of which the said compensation charge of 20*l.* was demanded is printed in the appendix hereto and numbered 3.

"The compensation charge imposed under s. 3 of the Licensing Act, 1904, and continued by the Licensing (Consolidation) Act, 1910, was in fact paid in respect of the said house until the licence came into the hands of this suppliant, and he thereupon refused to pay the said compensation charge, but ultimately agreed to do so under protest as hereinbefore in clause 4 of this case appears.

"6. The suppliant contends that upon the conviction of Stephen Morgan on July 18, 1907, the licence which he then held in respect of the 'Prince Albert' ceased to exist and that the licence renewed at the general annual licensing meeting of the said Tower justices held in 1911 in respect of the said premises and since held by him is not an 'old on licence' within the meaning of s. 21 of the Licensing (Consolidation) Act, 1910, and the Second Schedule, Part I., of that Act, and is therefore not chargeable with any contribution to the compensation fund to be raised under the powers of the said section.

"7. The suppliant claims repayment to him of the said sum of 20*l.*

"8. The Attorney-General for the Crown admits that the sum of 20*l.* was paid by the suppliant under protest and is repayable to him if his licence was not subject to compensation charge, but contends—That the licence held by the suppliant in respect of the said premises is an 'old on licence renewed' within the

meaning of s. 21 of the Licensing (Consolidation) Act, 1910, and that the suppliant was therefore properly charged with the said sum of 20*l.*

"The Attorney-General will also if necessary rely upon s. 112 of the Licensing (Consolidation) Act, 1910, and s. 38 of the Interpretation Act, 1889.

"9. The question for the opinion of this honourable Court is—Whether the suppliant is entitled under the circumstances above set forth to recover and be repaid the said sum of 20*l.*

"10. If the Court should be of opinion that the suppliant is entitled to recover the said sum of 20*l.* the Court shall enter judgment for the suppliant for that amount with costs.

"If the Court shall be of opinion that the suppliant is not entitled to recover the said sum of 20*l.* the Court shall enter judgment for the Crown with costs.

"A. H. Bodkin.
"F. F. Daldy."

"APPENDIX.

"EXTRACT FROM REGISTER OF LICENCES.

No. 1.

London Tower Division extract from official Register.

Victuallers' Licences.

Liberty of the old Artillery Ground.

Page 125.

Street in in which situate.	Sign of house.	If for 6 days insert 6.	Name of person licensed. If transferred insert to whom and when.	Name and address of owner of premises.	1. Record of conviction. 2. Forfeiture of licences. 3. Disqualification of premises, &c.
Brushfield Street	"Prince Albert"	—	Stephen Morgan Samuel Jacobs 30/9/07. David Jacobs 1/11/09. Rose Cooney, wife of John Cooney 18/4/10. James William Wernham 26/6/11.	Isaiah Henry Jones, 199, Maida Vale, W.	Stephen Morgan convicted of a felony by a jury 18 July, 1907.

1913

WERNHAM v. REX.

"I the undersigned hereby certify that the foregoing is a true copy of or extract from the official register part I. for the year 1912 of persons licensed to keep houses for the sale of intoxicating liquor within the Tower Division in the county of London kept in pursuance of 10 Edw. 7 & 1 Geo. 5, sec. 53 (3.).

"As witness my hand this 11th day of January, 1912.

"Edwd. Wm. Beal

Stamp 1/-

"Clerk to the Justices acting in and for the said Division.

"Notice to pay Excise Duties, &c.

No. 2.

"No. 15 on pay list.

"London east collection.

"London east 3 station.

"To Mr. J. W. Wernham,
of 21 Brushfield Street.

"The amount chargeable in respect of your intoxicating liquor licence &c. is shown below. Payment is made to the collector Mr. J. Stephenson (to whom all cheques are to be made payable) at the office of the collector of Customs and Excise, 122, Minories, E., at 10 A.M. on Monday, November 13, 1911, unless you have previously remitted the amount.

"H. B. L. (officer's initials.)

	£	s.	d.
Intoxicating liquor licences—			
Publican £130 - - - - -	65	0	0
Total	65	0	0
Tobacco dealer's licence - - - -	0	5	3
Compensation levy - - - - -	20	0	0
Total charge	£85	5	3
Amount now payable if payment is made by instalment - - - - -	£52	15	3

"Copy of Justices' Licence.

No. 3.

"Licensing (Consolidation) Act, 1910.

"At the general annual licensing meeting holden at the Shoreditch Town Hall, Old Street, in the parish of Saint Leonard, Shoreditch, on February 6, 1911, for the 'division of the Tower in the county of London.

"The licensing justices for the said division hereby grant unto James William Wernham of Brushfield Street by way of renewal his justices' licence authorising him to hold an excise licence to sell by retail at the licensed premises situated at Brushfield Street in the Liberty of Old Artillery Ground in the metropolitan borough of Stepney known by the sign of the 'Prince Albert' any intoxicating liquor which may be sold under a spirit retailer's (or publican's) licence for consumption either on or off the premises.

"The owners of the premises in respect of which this licence is granted are Mann, Crossman and Paulin, Limited, of the Brewery, Mile End, E.

"This licence shall be in force from the fifth day of April next until the fifth day of April then next ensuing.

"Given under the official seal of the Licensing Justices which is hereto affixed under their authority by me.

"(Signed) Edw. Wm. Beal
"Clerk to the Licensing Justices."

Bodkin, for the suppliant. The question is whether the suppliant is the holder of an old on licence within the meaning of s. 21 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), that is to say, by Sched. II., Part I., a justices' on licence which was in force on August 15, 1904, or a licence granted by way of renewal of a licence so in force, whether the licence continued to be held by the same person or has been transferred to any other person. He is not the holder of such a licence.

First, he is not the holder of a licence which was in force on August 15, 1904, because that licence came to an end on

1913

WERNHAM v. REX.

July 18, 1907, when Stephen Morgan was convicted of felony: *Freer* v. *Murray* (1); *Tower Justices* v. *Chambers*. (2)

Secondly, he is not the holder of a licence granted by way of renewal of a licence so in force: *Hargreaves* v. *Dawson* (3); *Reg.* v. *Justices of West Riding*. (4)

Thirdly, the licence which was in force on August 15, 1904, was not one which has been transferred to any other person. That which does not exist cannot be transferred: *Reg.* v. *Justices of West Riding*. (4)

The licence in question is not a new licence within s. 12 of the Licensing (Consolidation) Act, 1910, as it was neither granted at a general annual licensing meeting nor confirmed by the confirming authority; neither is it an old on licence; it belongs in truth to an indeterminate class not dealt with by the Act. What happened was that on the conviction of Stephen Morgan on July 18, 1907, an application was made under s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), and s. 14 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), by the owners through their agent Samuel Jacobs for authority to carry on the business of the house until the next special sessions. This application was granted. At the next special sessions held on September 30, 1907, a further application was made under s. 15 of the Act of 1874 "for the grant of a licence" in respect of the premises, and a licence was granted to remain in force until April 5, 1908. In February, 1908, at the general annual licensing meeting an ordinary justices' licence was granted to Samuel Jacobs by way of renewal of the licence granted by the special sessions. What was granted at the special sessions? "A licence in respect of such premises," in the words of s. 15 of the Act of 1874, under which the application and grant were made, or "a licence to sell exciseable liquors to be drunk in such house" in the words of s. 14 of the Alehouse Act, 1828, referred to in the later enactment. Those words may describe a new licence—*Hargreaves* v. *Dawson* (3)—but they do not indicate a transfer. A transfer implies an existing licence, whereas the application and grant under s. 15 of the Act of 1874 presuppose an extinct licence.

(1) [1894] A. C. 576.
(2) [1904] 2 K. B. 903.
(3) (1871) 24 L. T. (N.S.) 428.
(4) (1888) 21 Q. B. D. 258.

Daldy, for the Crown. This case has nothing to do with licences granted in or before 1869 and alleged to be in force and to have been renewed from time to time since that date. Therefore *Freer* v. *Murray* (1) and *Tower Justices* v. *Chambers* (2) are not in point. The question in this case is quite different. Has the licence which was in force on August 15, 1904, been "transferred to any other person" within the meaning of Sched. II., Part I., to the Act of 1910? That is the question in this case, and it turns on the meaning of the word "transferred." By s. 23 the transfer of a justices' licence is "the grant of a justices' licence . . . . to one person in substitution for another person who holds or has held the licence." Those words exactly describe what was conferred on Samuel Jacobs at the special sessions on September 30, 1907. A grant was made to him in substitution for Stephen Morgan, who had held the licence. In other words that licence was transferred to Samuel Jacobs. If further demonstration were necessary it will be found in s. 23, sub-s. 2 (*a*), which provides that "a transfer can only be authorized in the cases mentioned in the first column of the Fourth Schedule to this Act and to the persons set opposite thereto respectively in the second column of that schedule." Sched. IV. contains in the first column this very case, "cases where the owner of the licensed premises or some person on his behalf on the forfeiture of the licence, or the personal disqualification of the holder of the licence, has obtained temporary authority under this Act to carry on business until the next transfer sessions and applies for a transfer at those sessions"; and the person specified in the second column to whom the transfer is authorized is "the owner or any person applying on his behalf." Then follow the words "and the transfer may be granted as if the licence to be transferred were, notwithstanding forfeiture, still valid."

The object of the Legislature was to divide all licences into two classes, (1.) new licences, (2.) renewed licences. There is no object or purpose in having a third and indeterminate class paying no contribution and having no share in the fund. The critical period in the history of this legislation is the year 1904,

(1) 1894] A. C. 576. (2) [1904] 2 K. B. 903.

1913

WERNHAM v. REX.

when it was first inaugurated. By s. 3 of the Licensing Act, 1904, quarter sessions were to impose in respect of all existing on licences renewed in respect of premises within their area charges as prescribed in Sched. I. to that Act. By s. 9, sub-s. 4, the expression "existing on licence" meant an on licence in force at the date of the passing of the Act, and included a licence granted by way of renewal from time to time of a licence so in force whether such licence continued to be held by the same person or had been "transferred" to any other person; and the expression "transfer" meant a transfer under s. 4 or s. 14 of the Alehouse Act, 1828. Transfers under s. 4 of the Act of 1828 were transfers strictly so called, where the transferor and transferee, the person intending to keep the inn and the person about to remove from the inn, were both before the Court. In those cases the licence to be transferred was an existing licence. In certain cases under s. 14, however,—for example in the case of the death of the holder—the licence was no longer in existence except for one purpose, namely, for empowering the justices to grant to certain persons a licence to sell exciseable liquors, such licence to continue in force until April 5 or October 10 then next ensuing as the case might be. In the case of a person being by sickness or other infirmity rendered incapable of keeping an inn, the justices at a special session were empowered to grant a licence to the assigns of that person. But the licences whether granted under s. 4 or s. 14 of the Act of 1828 were called indifferently "transfers" in the Act of 1904. It is true that the case of a licence being forfeited for the felony of the holder is not within either s. 4 or s. 14 of the Act of 1828, and therefore the grant of a licence to the substitute or successor of the holder is not within the express terms of the definition of a transfer in the Act of 1904. But it is submitted that that grant also is a "transfer" within the meaning and intention of that Act. That case is provided for by s. 15 of the Licensing Act, 1874. There may be made by or on behalf of the owner of the premises an application for authority to carry on the business until the next special sessions and a further application at those sessions for the grant of a licence, and for that purpose the provisions of the Act of 1828 with respect to the grant of a

temporary authority and to the grant of licences at special sessions apply as if the person convicted had been rendered incapable of keeping an inn and the person applying for the grant was his assignee. If a grant under that enactment is not a transfer within the Act of 1904, it certainly is a transfer within the Act of 1910, and that is sufficient to entitle the Crown to judgment.

Bodkin in reply.

Dec. 8. BAILHACHE J. read the following judgment:—This case raises the question whether the suppliant, James William Wernham, is liable to pay a compensation levy in respect of the "Prince Albert" public-house, Shoreditch, of which he is the tenant and licensee. No point is raised as to the sum (if any) payable. The levy is payable in respect of all old on licences, and these licences are defined by the First Part of the Second Schedule to the Licensing (Consolidation) Act, 1910, as, amongst others, justices' on licences which were in force on August 15, 1904, including licences granted by way of renewal of a licence so in force, whether the licence continues to be held by the same person or has been or may be transferred to any other person or persons. The section of the Act which entitles the compensation authority to make the levy is s. 21. The compensation fund was first established by the Licensing Act, 1904, but that Act was repealed by the Consolidation Act, 1910, where the present law as to compensation is to be found.

The "Prince Albert" was licensed before 1904 and has been, with a short interval in 1907, continuously licensed since, but the suppliant says that the break of continuity in 1907 prevented the licence which he now holds being a licence by way of renewal of a licence in force in August, 1904.

The relevant facts are these. In 1907 one Stephen Morgan was the holder of a licence in respect of the "Prince Albert" by way of renewal of a licence in force in August, 1904. On July 18, 1907, Stephen Morgan was convicted of felony and his licence thereupon became forfeited. On August 13, 1907, the owners by their agent Samuel Jacobs applied for and obtained authority to carry on

1913

WERNHAM v. REX.

Bailhache J.

the business until the next special sessions. At those sessions, held on September 30, 1907, the justices granted Jacobs a licence to remain in force until April 5, 1908, the date on which the licence held by Morgan would have expired in due course, and at the annual licensing sessions in February, 1908, granted Mr. Jacobs a licence by way of renewal of the licence then held by him until April 5, 1909. That licence has ever since been continually renewed and continuously effective.

It was contended by the Crown that the licence granted by the justices in September, 1907, was a transfer within the meaning of the Licensing Acts of the licence held by Morgan, the convicted tenant, at the date of his conviction in July of that year, and that the renewal in February, 1908, was, as every subsequent renewal has been, a renewal of the same licence.

It was contended for the suppliant that the licence held by Morgan was forfeited and became void upon his conviction, that it was therefore incapable of transfer, and that the authority or licence granted by the justices in September, 1907, did not and could not revive the old licence, but was a licence of an indeterminate class, not exactly a new licence, and certainly not a transfer, and that what was renewed at the annual licensing sessions in 1908 and has been annually renewed ever since is the licence of this indeterminate class. I can find no recognition in the Licensing Acts of this indeterminate class of licence, and as, through no fault of Mr. Bodkin's, I failed to understand how such a class could be, beyond saying I do not accept this view I make no further mention of it. Mr. Bodkin further argued that if this contention was wrong the licence granted at the special sessions in 1907 was a new licence. It is this contention which I propose to examine, and I will approach the question by a consideration in the first place of how the matter stands upon the statutes relevant to the question in hand, apart from any authorities there may be upon the point.

The conviction upon which the suppliant relies as having broken the chain which would otherwise connect his licence with the licence held in 1904 took place in 1907. One must therefore see how the law stood at that date. To find this out one must look at the Act of 1904, the Licensing Act of 1874,

and the Alehouse Act of 1828. By the Licensing Act, 1904, s. 3, the liability to compensation levies was imposed on all existing on licences renewed within the area of the quarter sessions imposing the levy. That Act contained in s. 9, sub-s. 4, a definition of "existing on licence" as meaning an on licence in force at the date of the passing of the Act, and including a licence granted by way of renewal from time to time of a licence so in force, whether such licence continues to be held by the same person or has been or may be transferred to any other person or persons. By the same sub-section "transfer" is defined as a transfer under s. 4 or s. 14 of the Alehouse Act, 1828. This definition of "transfer" carries one back to the Alehouse Act of 1828, and incidentally to the Licensing Act of 1874, as the application to the justices in September, 1907, was made under the combined provisions of s. 15 of the Act of 1874 and s. 14 of the Act of 1828. Sect. 4 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), provides for the granting of licences at special sessions to incoming tenants where there is a change of occupancy during the currency of the licence, and is the most usual instance of a transfer. Sect. 14 provides for the granting of licences at special sessions to persons other than the holders of such licences in exceptional circumstances. The cases provided for are numerous. In the first part of the section provision is made for the incapacity of the licensee to continue to hold the licence in consequence of death, sickness, or bankruptcy, and in those cases the application must be made before the expiration of the licence. Next, provision is made for a licensee who has moved or who is about to move from licensed premises and who neglects or refuses to apply for a renewal at the annual licensing sessions. In this case application may be made after the expiration of the licence whose renewal has not been applied for. The words "before the expiration of the licence" do not apply to these cases. The section then provides for removals in certain cases which need not detain us. There is then a general proviso that none of the licences so granted shall remain in force beyond the period for which a licence if granted or renewed at the preceding annual sessions would have held good. It will be observed that no provision is made here for the case of the forfeiture of a

1913

WERNHAM v. REX.

Bailhache J.

licence by the conviction of the holder for any offence which works a forfeiture. For this one has to turn to the Licensing Act, 1874, s. 15. By that section, so far as is now material, where any licensed person is convicted for the first time of felony and in consequence either becomes personally disqualified or has his licence forfeited, the owner may take the steps which the owners took in this case, and "for this purpose the provisions contained in the Alehouse Act, 1828, shall apply as if the person convicted had been rendered incapable of keeping an inn and the person applying for such grant was his assignee." I may remark in passing that it has been held that the word "assignee" refers to the licensed premises and not to the licence. What I desire more particularly to note is that the case of application after forfeiture by felony is assimilated to the first batch of cases provided for by s. 14 of the Alehouse Act, 1828, namely, those cases where application must be made during the currency of the licence, and not to those where application may be made after its expiration—in other words, to those grants which are transfers strictly so called.

I have, I think, now all the statutory material for determining whether the grant of a licence in September, 1907, in this case was a transfer within the definition of that word as contained in the Act of 1904. It is to be observed that that definition makes no distinction between the different kinds of grants dealt with by ss. 4 and 14 of the Act of 1828. It calls them all "transfers." Some are transfers in the ordinary sense of the term. All grants under s. 4 are transfers in this sense; so, too, are the grants under the first part of s. 14. There is in all these cases a current licence. Grants under the second part of s. 14 are not or may not be transfers in the ordinary sense, for there may be no existing licence to transfer.

In my view the justices did at special licensing sessions in September, 1907, grant a licence to Jacobs which was, within the meaning of the word "transfer" as defined in the Act of 1904, a transfer of the licence previously held by Morgan and forfeited by his conviction for felony. I turn now to see how the matter stands under the codifying Act of 1910. I do this not because I think it governs this case, but because if I found the

Code of 1910 at variance with the view I have arrived at I should greatly doubt the correctness of my opinion. I find it, on the contrary, clearly in favour of my view. By s. 21 compensation levies are to be made in respect of all old on licences renewed within the area of the compensation authority. By Sched II., Part I., old on licences are (inter alia) justices' licences which were in force on August 15, 1904, including licences granted by way of renewal of a licence so in force whether the licence continues to be held by the same person or has been or may be transferred to any other person or persons.

Transfers are dealt with in a group of sections, 22 to 28, of which s. 23 is the material one. That section defines a transfer thus: "For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence." By sub-s. (*a*) "a transfer can only be authorized in the cases mentioned in the first column of the Fourth Schedule to this Act and to the persons set opposite thereto respectively in the second column of that schedule." On turning to that schedule I find amongst other cases the very case now under consideration.

I see no reason to suppose that the Code of 1910 was intended to alter the law as enacted by the Act of 1904. In my opinion it does not alter the law, but makes what was already reasonably clear under the Act of 1904 quite clear and plain and beyond controversy in any case of forfeiture by felony subsequent to 1910.

So far I have dealt with the question without reference to the cases, but Mr. Bodkin tells me that there are two cases, namely, *Freer* v. *Murray* (1) and *Tower Justices* v. *Chambers* (2), which are conclusive against the view I have formed upon the statutes unassisted by the authorities. If this case was governed by the Code of 1910 I should have declined to consider the earlier authorities. The Code seems to me too clear for doubt, and I do not see much use in a Code if where the Code is clear one has to go laboriously through the cases decided before the Code was enacted. The Act of 1904, however, is not a Code, it refers back to the Act of 1828, and one has to look

(1) [1894] A. C. 576. (2) [1904] 2 K. B. 903.

1913

WERNHAM v. REX.

Bailhache J.

in addition to the Act of 1874, so that I am afraid I must see whether there is anything in the decided cases which compels me to come to a different conclusion to that at which I have arrived without them.

My researches into the cases led me to consider some earlier cases than those referred to, and I had better perhaps say a word about them. They all except one deal in varying forms with renewals or transfers of old beerhouse licences. Under s. 19 of the Wine and Beerhouse Act, 1869, justices' discretion in the renewal of old beerhouse licences was confined, as is well known, to four specific grounds, and the point more than once came up for decision as to whether a particular licence was or was not an old beerhouse licence. To constitute an old beerhouse licence it was necessary that the licence should have been in force on May 1, 1869, and by s. 7 of the Act of 1870, s. 19 of the Act of 1869 is to extend to licences in force on May 1, 1869, " . . . . whether such licences continue to be held by the same person or have been or may be transferred to any other person," words not distinguishable from those of the Act of 1904. In 1871 a Divisional Court held in *Hargreaves* v. *Dawson* (1) that when a licence existed on May 1, 1869, but was forfeited during the year, an application for a licence at the next annual licensing sessions was an application for a new licence and not a renewal. This seems a clear case and an obvious conclusion. In 1873 in the case of *Reg.* v. *Curzon* (2) the question arose whether the justices' discretion was limited to the four grounds in a case where the licence held in May, 1869, had expired by effluxion of time something over a year, and it was held that the justices' discretion was not so limited. This again seems clearly so. In 1874, in *Ex parte Tarbath* (3), the same question in effect was raised again and decided in the same way. In the meantime the Act of 1872 had been passed, and by s. 74 of that Act a renewal was defined as a licence granted at the annual sessions by way of renewal. The house had been closed for two or three years, and Blackburn J. said a renewal means a renewal of a licence which existed during the year before.

(1) 24 L. T. (N.S.) 428. (2) (1873) L. R. 8 Q. B. 400.
(3) (1874) 31 L. T. (N.S.) 513.

In 1883, in *Reg.* v. *Justices of Liverpool* (1), the Court of Appeal held that under s. 14 of the Act of 1828 a renewal might be applied for after the former licence had expired by effluxion of time in a case where the outgoing tenant did not apply for a renewal during the currency of the licence. The Court there held that in a case coming within the provision of s. 14 of the Act the fact that the licence had expired made no difference.

In 1888, in *Reg.* v. *Justices of the West Riding* (2), a licensee of a beerhouse was convicted of allowing his premises to be used as a brothel. After conviction an application for transfer was made by a new tenant and refused upon the ground that, the licence being forfeited, it was no longer in force and the justices had full discretion. It is to be observed that no advantage could be taken of s. 15 of the Act of 1874. The case did not fall within it. Allowing premises to be used as a brothel is not one of the four cases to which that section applies. In 1889, in *Stevens* v. *Green* (3), the facts were that a tenant who held an alehouse licence had been convicted of felony and the landlord had obtained authority at petty sessions to carry on the business to a special sessions to be held on April 6. At such special sessions a new tenant applied for a transfer and was refused. He remained tenant of the house without a licence until the next annual sessions and he then applied for a renewal. The Divisional Court held that he was not entitled to a renewal, but ought to have applied for a new licence. The ground of the decision was that as the transfer had been refused there was at the annual sessions no licence in existence, but I gather that if the transfer had been granted they would have held otherwise, and they threw no doubt whatever upon the right to apply for a transfer under s. 15 of the Act of 1874 although the former tenant's licence had become forfeited. I have gone a little fully into this case because the head-note in the *Law Reports* seems to me misleading.

I come now to the cases more particularly relied upon for the suppliant. In 1894, in *Freer* v. *Murray* (4), the matter came before the House of Lords. The case is an instance of the

(1) (1883) 11 Q. B. D. 638.
(2) 21 Q. B. D. 258.
(3) (1889) 23 Q. B. D. 143.
(4) [1894] A. C. 576.

1913

WERNHAM v. REX.

Bailhache J.

second class of cases provided for by s. 14 of the Act of 1828 and was not within s. 15 of the Act of 1874. The circumstances were these: An old beerhouse licence was held by one Faulkner, a tenant. It expired on October 10, 1891. He left the premises on October 5. On October 9 the new tenant Freer gave notice of his intention to apply at the next special sessions for a transfer. The justices declined to grant a transfer as there was no licence in force, the old licence having expired in October, and the justices claimed to be free to exercise a general discretion and not to be confined by the four statutory grounds. The House of Lords held they were right. Lord Herschell deals with the point that an application may be made at a special session in such a case and says (1): "I think the licence was not in a state of suspended animation, but was dead and incapable of coming to life again and that all that could be granted was a new licence, not one technically so called, but, if you like, a transfer within the meaning of the Licensing Acts, nevertheless not a licence which in any way revived the old licence, or bridged over the time after the old licence came to an end." This case was followed by the Court of Appeal in *Tower Justices* v. *Chambers*. (2) That was a case within s. 15 of the 1874 Act. The licensee had been convicted of selling spirits without a licence whereby the licence became forfeited. The owners applied at a special sessions under the provisions of s. 15 of the Act of 1874 for a grant to another tenant, and it was held that the licence was not in force at the date of the application for a transfer. These two decisions appear at first sight to support Mr. Bodkin's argument, but two things must be borne in mind. One is that it was always held that the words "in force" in the Acts of 1869 and 1870 mean continuously in force. The other is that the Act of 1870 contains no definition of the word "transfer." The latter point seems to me to distinguish the question in this case from the authorities so strongly relied upon for the suppliant. I understand *Freer* v. *Murray* (3) to decide that where a licence expires, although after its expiration the owner of the premises may take advantage of the Act of 1828 to apply for what is called

(1) [1894] A. C. at p. 583. (2) [1904] 2 K. B. 903.
(3) [1894] A. C. 576.

a transfer, yet, as the licence in such a case is dead, the licence granted by the justices, if they accede to the owner's application, is in truth and in fact a new licence. The case of *Tower Justices* v. *Chambers* (1) decides that the same is true where the licence has been forfeited by the conviction of the licensee for felony. The radical distinction between those cases and the present case is that by the Act of 1904 the word "transfer" is specifically defined and covers all transfers under ss. 4 and 14 of the Alehouse Act, and, as I have endeavoured to shew, some of these transfers may be made after the old licence has ceased to exist. I confess it looks to me as though the draftsman of the 1904 Act was aware of those decisions and has been at pains to provide that they shall not apply. I think he has succeeded. The House of Lords and the Court of Appeal considered the question from the point of view of whether what was called a transfer was a transfer in truth and in fact. Lord Herschell says you may call it a transfer if you like, but it is not a transfer. I have not to consider that question, but exactly the opposite one, namely, whether what happened in 1907 is called a transfer, whether it be in fact a transfer or not. The cases cited to me do not therefore in my judgment govern this case, and I adhere to the opinion I had formed without the aid of the authorities. The suppliant's case fails.

Judgment for the Crown.

Solicitors for suppliant: *Crossman, Prichard, Crossman & Block.*

Solicitor for the Crown: *The Solicitor for the Customs and Excise.*

NOTE.—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21: "(1.) The compensation authority shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purpose of their powers and duties under this Act as compensation authority, impose in respect of all old on-licences renewed in respect of premises within their area, charges at rates not exceeding, and graduated in the same proportion as, the rates shown in the scale of maximum charges set out in the First Part of the Third Schedule to this Act.

(1) [1904] 2 K. B. 903.

1913

WERNHAM v. REX.

"(2.) Charges payable under this section in respect of any licence shall be levied and paid together with, and as part of the duties on, the corresponding excise licence, but a separate account shall be kept by the Commissioners of Customs and Excise of the amount produced by those charges in the area of any compensation authority . . . ."

Sect. 23: "(1.) For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence.

"(2.) An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows:—

"(*a*) A transfer can only be authorized in the cases mentioned in the first column of the Fourth Schedule to this Act and to the persons set opposite thereto respectively in the second column of that schedule."

"SECOND SCHEDULE.

"First Part.

"Description of Old On-Licences.

"Justices' on-licences which were in force on August 15, 1904, including—

"(*a*) licences granted by way of renewal of a licence so in force; and

"(*b*) licences which, though not in force at that date, had been before that date provisionally granted and confirmed under section 22 of the Licensing Act, 1874, in cases where the provisional grant and order for confirmation was subsequently declared final,

whether the licence continues to be held by the same person or has been or may be transferred to any other person or persons."

"FOURTH SCHEDULE.

"Cases in which and Persons to whom a Transfer may be granted.

. . . . "Cases where the owner of the licensed premises or some person on his behalf on the forfeiture of the licence . . . . has obtained temporary authority under this Act to carry on business until the next transfer sessions and applies for a transfer at those sessions.	"The owner or any person applying on his behalf, and the transfer may be granted as if the licence to be transferred were, notwithstanding forfeiture, still valid."

Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3: "(1.) Quarter sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act."

Sect. 9, sub-s. 4: "In this Act . . . . the expression 'on licence' means a licence for the sale of any intoxicating liquor (other than wine alone or

sweets alone) for consumption on the premises . . . . and the expression 'existing on licence' means an on licence in force at the date of the passing of this Act and includes a licence granted by way of renewal from time to time of a licence so in force, whether such licence continues to be held by the same person or has been or may be transferred to any other person or persons . . . .

"The expression 'transfer' means a transfer under section 4 or section 14 of the Alehouse Act, 1828."

Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 15: "Where any licensed person is convicted for the first time of any one of the following offences; . . . . (4.) Any felony; and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 4: "The justices assembled . . . . at the general annual licensing meeting . . . . shall appoint not less than four nor more than eight special sessions, to be holden in the division or place for which each such meeting shall be holden, in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises."

Sect. 14: "If any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors; or if any person so licensed . . . . shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose; or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for

1913

WERNHAM v. REX.

the reception of travellers, and for the other legal purposes of an inn; it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have bona fide conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: Provided always, that every such licence shall continue in force only from the day on which it shall be granted until April 5, or October 10 then next ensuing, as the case may be; . . . ."

W. H. G.

1913

Dec. 12, 13.

LONDON COUNTY COUNCIL *v.* HANKINS.

Common Lodging-house—Lodgers sleeping in Separate Rooms—No Common Eating Room—Necessity for Licence to keep—London County Council (General Powers) Act, 1902 (2 *Edw.* 7, *c. clxxiii.*), *Part. IX.*

In order to constitute a "common lodging-house" there must be community of accommodation for either sleeping or eating.

CASE stated by a metropolitan police magistrate.

The respondent was summoned on four informations for keeping a common lodging-house and receiving lodgers therein at Nos. 32, 36, 39, and 42, Crescent Street, Kensington, respectively without having obtained a licence from the London County Council contrary to the provisions of the London County Council (General Powers) Act, 1902, Part IX. At the hearing of the informations the following facts were proved or admitted:—

The respondent was the rated occupier of the four houses in question. Upon the dates specified in the informations lodgers were received in the said houses for the night or other period less

than a week, and such persons were apparently of the ordinary common lodging-house or "dosser" class. Each person had the exclusive use of a room (with the key thereof), and there was no common room for such persons either for eating or sleeping in any of the said houses. Several of the lodgers had been in continuous occupation of their respective rooms, many of them having occupied their rooms for periods of from six to ten years; but the same feature, that of permanency, is found in licensed lodging-houses. The charge made for such lodging was 1*s.* a night to women, which is slightly above the average price in the ordinary licensed common lodging-houses in London, but is not in excess of that charged in some. No food was sold to such persons on any of the premises.

It was contended by the appellants: (*a*) that each of the houses in question was a common lodging-house within the words of the statutory definition adopted by the Court of Appeal in the case of *Parker* v. *Talbot* (1), namely, a house in which persons are harboured or lodged for hire for a single night or for less than a week, or any part of which is let for any term less than a week; (*b*) alternatively, if the words of the definition were not to be taken literally, the only qualification to be imported into them was that the persons received should be persons of the common lodging-house class, and that that condition was fulfilled; and the appellants relied on s. 94 of the Public Health (London) Act, 1891, in support of that contention.

The respondent admitted that the houses in question were houses in which persons were harboured or lodged for hire for a single night or for less than a week, but contended that nevertheless they were not common lodging-houses inasmuch as there was no community in eating or sleeping accommodation.

The magistrate was of opinion that the definition adopted in *Parker* v. *Talbot* (1) was not exhaustive and that the element of community must exist. He was also of opinion that if the appellants' contentions were correct s. 94 of the Public Health (London) Act, 1891, would be nugatory. He accordingly dismissed the informations.

(1) [1905] 2 Ch. 643.

1913

LONDON COUNTY COUNCIL v. HANKINS.

Ryde, K.C., and *Rowsell*, for the appellants. The test of a common lodging-house within the meaning of the Common Lodging Houses Acts is not whether the inmates live in common but whether the house is common in the sense of being open to all the public, so that practically any person may claim admission however dirty his condition. The word "common" is used in the same sense as in the phrase "common carrier." In *Langdon* v. *Broadbent* (1) Lindley J. said: "The kind of house that is meant is one that is open to all comers and therefore requires supervision in order to insure cleanliness." And Grove J. said: "I do not think it is necessary to shew that the lodgers are all herded together in order to bring the case within the statute." In *Booth* v. *Ferrett* (2) it was held that a house which was maintained as a charitable institution and not for purposes of gain, and was open only to such persons as the keeper chose to admit, was not a common lodging-house. In *Logsdon* v. *Booth* (3) so much of *Booth* v. *Ferrett* (2) as held that the fact of the house being kept for charity and not for profit prevented it from being a common lodging-house was overruled, and a Salvation Army shelter was held to be within the Act. But the principle that the important element is that the house should be open to all comers was affirmed, and in that respect *Langdon* v. *Broadbent* (1) and *Booth* v. *Ferrett* (2) were followed, the Common Lodging Houses Acts being regarded as essentially sanitary measures. It is true that Lord Russell C.J. there adopted the definition of a common lodging-house given by Sir Alexander Cockburn and Sir William Page Wood when law officers of the Crown in 1853, that it is a house "in which persons of the poorer class are received for short periods, and, though strangers to one another, are allowed to inhabit one common room." (4) But so far as in adopting that definition he suggested that community of accommodation is a necessary element the dictum was obiter, for in the shelter in question the inmates both slept and ate in common rooms. In *Logsdon* v. *Trotter* (5) Channell J. laid down three tests

(1) (1877) 37 L. T. 434.
(2) (1890) 25 Q. B. D. 87.
(3) [1900] 1 Q. B. 401.
(4) See Glen's Public Health, 13th ed., p. 419, n.
(5) [1900] 1 Q. B. 617.

of a common lodging-house—(1.) that the house should be intended for a class of society who are dirty, likely to be diseased, and in an insanitary condition; (2.) that it should be open to all comers; and (3.) that it should be a place where people live in common. But there again that last proposition was obiter, for though the inmates there had separate bedrooms they ate in common, and it was consequently unnecessary to decide the point. There is no case in which it has been expressly held that the absence of community of accommodation excluded the house from the operation of the Acts. In *Gilbert* v. *Jones* (1) the cases of *Logsdon* v. *Booth* (2) and *Logsdon* v. *Trotter* (3) were followed, and a night refuge for persons of the poorest class kept as a charitable institution, no payment being made by the persons admitted, was held to be a common lodging-house. The outcome of the authorities so far is that the Act must be looked at as a sanitary Act, and that in each case the Court must consider whether the inmates are so associated together as to be likely to spread disease. That is a result which may be brought about without there being any rooms used in common. There is nothing to prevent the lodgers sitting in one another's rooms and talking together, and the mere fact that each lodger is given the key of his room so that he can exclude the others if he chooses is not enough. Moreover disease may be spread without the lodgers coming into actual contact; an infected person may leave his infection behind him, and the disease be communicated to the next occupant of his room. The decision in *Gilbert* v. *Jones* (1) not being appealable, and it being desired to question its correctness, an action, *Parker* v. *Talbot* (4), was brought in the Chancery Division by a subscriber to the funds of the charity to restrain the trustees from using the premises as a common lodging-house. The Court of Appeal, having had their attention directed to the Common Lodging Houses (Ireland) Act, 1860 (23 & 24 Vict. c. 26), which in s. 3 contains this definition: "The term 'common lodging-house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or

(1) [1905] 2 K. B. 691.
(2) [1900] 1 Q. B. 401.
(3) [1900] 1 Q. B. 617.
(4) [1905] 2 Ch. 643.

1913

LONDON COUNTY COUNCIL v. HANKINS.

any part of which is let for any term less than a week," held that that definition applied to the same expression in the English Acts, and accordingly overruled the decision in *Gilbert* v. *Jones* (1) upon the ground that, no payment being taken, the inmates could not be said to be "lodged for hire." The facts of the present case fall exactly within that definition, which, if the earlier cases are to be treated as overruled, must be taken to contain all the essential elements of a common lodging-house, the words of the Irish Act being that "the term 'common lodging-house' shall mean," not "shall include."

Drucquer, for the respondent. Common lodging-houses are the subject of certain statutory provisions. Lodging-houses are the subject of other distinct provisions. This is an attempt to bring the latter within the enactments for regulating the former. Common lodging-houses and houses let in lodgings have existed side by side for over sixty years, each with their appropriate enactments distinct and separate. In the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 76 to 89 inclusive relate to common lodging-houses; s. 90 relates to houses let in lodgings but "shall not apply to common lodging-houses within the provisions of this Act relating to common lodging-houses." Sect. 90 provides that the Local Government Board may declare that enactment to be in force within the district of any local authority; and after such a declaration the local authority may make by-laws for fixing and varying the number of persons who may occupy a house which is let in lodgings, for the registration and inspection of such houses, for enforcing drainage, cleanliness, and ventilation, lime-washing at stated times, &c. This section corresponds with s. 94 of the Public Health (London) Act, 1891, under which the borough of Kensington have made by-laws embodying all the sanitary regulations to which the house would be subject if it was a common lodging-house.

The substantial question is whether the definition in the Common Lodging Houses (Ireland) Act, 1860, is exhaustive in the sense of specifying all the essential characteristics of a common lodging-house. It is clearly not so; for if it were the term common lodging-house would include a first-class hotel.

(1) [1905] 2 K. B. 691.

Some further definition is necessary. The necessary element is supplied in *Logsdon* v. *Trotter*. (1) Neither that case nor *Logsdon* v. *Booth* (2) is overruled by *Parker* v. *Talbot*. (3) The only question in the last mentioned case was whether it was a necessary element in the constitution of a common lodging-house that the applicants should be admitted for hire. The definition contained in the Irish statute decided that point in express terms. But the judgment of Cozens-Hardy L.J. certainly adds another term to that definition, namely, that the persons receiving the benefit of a charity (where the institution is a charitable one) must be of the very poor and humble class whose sanitary conditions call for special attention. If *Logsdon* v. *Booth* (2) and *Logsdon* v. *Trotter* (1) are not overruled by *Parker* v. *Talbot* (3), they bind this Court and conclude this case in favour of the respondent. "Herding together," in the words of Lord Russell C.J. in the earlier case, and association in insanitary conditions, as indicated by Channell J. in the later case, remain essential elements in the constitution of a common lodging-house. The question whether those elements exist in a given set of circumstances is a question of fact. Common and simultaneous occupation is the distinguishing feature of a common lodging-house. Successive occupation and its dangers are amply provided for in the by-laws regulating houses let in lodgings. The interpretation of the Common Lodging-Houses Acts given in *Logsdon* v. *Booth* (2) and *Logsdon* v. *Trotter* (1) depends not on the meaning of the word "common" nor on any definition of the expression "common lodging-house," but depends upon the construction of the statutes in their entirety. That interpretation remains untouched by *Parker* v. *Talbot*. (3)

Ryde, K.C., in reply.

CHANNELL J. In this case we are of opinion that the appeal must be dismissed. The question is not by any means free from difficulty, and one of the difficulties arises from the recent decision of the Court of Appeal bringing into this Act a definition which was not known of when many of the earlier cases

(1) [1900] 1 Q. B. 617. (2) [1900] 1 Q. B. 401.
(3) [1905] 2 Ch. 643.

1913

LONDON COUNTY COUNCIL v. HANKINS.

Channell J.

were decided, and we have to consider how the matter now stands.

Prior to the Act which we have to construe there had been passed in the year 1847 the Towns Improvement Clauses Act, an Act which might or might not be incorporated in local Acts, but in that Act there was a definition of what was then called a "public lodging-house," and it was practically in the same words as the definition of a "common lodging-house" in an Act subsequently passed in 1860 applying to Ireland. The definition was in these words: "Every house shall be deemed to be a public lodging-house within the meaning of this Act in which persons are harboured or lodged for hire for a single night, or for less than a week at one time, or any part of which is let for any term less than a week." Then we come to the Act which we have to construe which was passed in 1851 and amended by another Act, which does not alter it in this respect, a year or two later. That Act of 1851 begins by referring to something which is called a "common lodging-house"; but it does not define it; it treats it as a thing which is well known. It may be that the Legislature had in mind the definition of a "public lodging-house" in the Act of 1847, but if so they did not think it desirable to include that definition or to limit the meaning of "common lodging-house" to what had been given as the meaning of "public lodging-house" in the earlier Act. It seems that they treated a common lodging-house as a thing which was well understood and which did not want definition; but they dealt with it in an Act of Parliament containing a preamble which to a certain extent set forth the intention of the Act, and they enacted provisions as to what should be required of common lodging-houses in the way of registration, sanitary precautions, and things of that sort. The Act having been passed it became necessary to construe it, and that must have been seen to be somewhat difficult, for the Board of Health, the predecessor of the present Local Government Board, consulted the law officers of the Crown, Sir Alexander Cockburn and Sir William Page Wood, who gave the following opinion: "It may be difficult to give a precise definition of the term 'common lodging-house,' but looking to the preamble and general provisions of the

Act it appears to have reference to that class of lodging-houses in which persons of the poorer class are received for short periods, and, though strangers to one another, are allowed to inhabit one common room. We are of opinion that it does not include hotels, inns, public-houses, or lodgings let to the upper and middle classes." (1) In arriving at that opinion they were doing what I think it would be right for a Court to do. They were considering the term "common lodging-house" partly in reference to the meaning which it would be understood to bear by people knowing the state of affairs in London and other places as to lodging-houses; they were also taking into account, and properly taking into account, the preamble to the Act and its policy, and the mischief which it was designed to remedy. A year or two afterwards there was a doubt suggested with respect to that opinion, for the same law officers were again consulted, and being invited to explain their own opinion said: "Our obvious intention was to distinguish lodgers promiscuously brought together from members of one family or household"—that was one difficulty that had obviously arisen—and they added that in their opinion "the period of letting is unimportant in determining whether a lodging-house comes under the Act now in question." (2) The next event in the history of this subject was the case of *Langdon* v. *Broadbent* (3), heard before Grove and Lindley JJ. There the Court had to interpret this Act, and Lindley J. said that in his view "common" there meant open to all the public, the word being used in the same sense as in the expression "common carrier." I have some doubt whether that exhausts the whole meaning of the word "common" as used in this Act, but undoubtedly it is the principal meaning, and I think Lindley J.'s view has been adopted in all the subsequent cases. In *Langdon* v. *Broadbent* (3) Grove J. seemed to be of opinion that neither community of accommodation for eating nor for sleeping was essential to constitute a common lodging-house. But it was unnecessary to decide the point, for though there was no evidence whether the lodgers slept in a common room, they all took their meals together.

(1) See Glen's Public Health, 13th ed., p. 419, n.

(2) Ibid.

(3) 37 L. T. 434.

1913

LONDON COUNTY COUNCIL v. HANKINS.

Channell J.

Then we come to the important cases of *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter*. (2) In the former of those cases Lord Russell C.J. undoubtedly adopted the opinion of the law officers to which I have already referred as to the proper construction of the Act. As I have already pointed out, that opinion did not proceed solely, or even mainly, upon their view of the meaning of the word "common" or of the expression "common lodging-house"; it was intended not as a definition, but as an exposition of the meaning of the Act as a whole founded upon the preamble and the policy of the Act and the mischief aimed at. That is, I think, also what the Court did in both the *Logsdon Cases*. I think that the decisions in those cases are authorities as to the meaning of the Act binding on this Court unless we can see that they are clearly overruled. Then in *Gilbert* v. *Jones* (3) it was held by a Divisional Court following those cases that the fact of no charge being made for the accommodation provided did not prevent the house in question from being a common lodging-house within the meaning of the Common Lodging Houses Acts. Lastly, the case of *Parker* v. *Talbot* (4), which dealt with the same facts as *Gilbert* v. *Jones* (3), came before the Court of Appeal. It was argued in the first instance upon the basis of the *Logsdon Cases*, and the main point discussed was whether a charitable institution came within the Act. The Lords Justices formed an opinion in affirmance of the Divisional Court in *Gilbert* v. *Jones* (3), but took time to consider their judgment, and whether they themselves discovered, or were informed by an amicus curiæ, of the existence of the Irish Act, they in consequence of getting that information had the case re-argued and considered that Act. Its title is "An Act to remove doubts as to the application of the Common Lodging Houses Acts to Ireland, and to amend the provisions of the same so far as they relate to Ireland." It recites that "doubts have arisen as to whether the Common Lodging Houses Act, 1851, and the Common Lodging Houses Act, 1853, extend to Ireland, and difficulties have occurred in the execution of the said Acts therein; and it is expedient that such doubts and difficulties should be removed, and for that purpose that the

(1) [1900] 1 Q. B. 401.
(2) [1900] 1 Q. B. 617.
(3) [1905] 2 K. B. 691.
(4) [1905] 2 Ch. 643.

said Acts should be explained and amended with reference to the execution thereof in Ireland." Then the Act provides by s. 2 for the extension of those two Acts in Ireland; and s. 3 provides as follows: "For the purpose of the execution of the said recited Acts and of this Act in Ireland certain words and expressions used in the said Acts are hereby declared and explained to have been intended to bear the following meanings"; and then there is this definition: "The term 'common lodging-house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week." Now the importance of this definition in that case, if it applied, was very great because it brought in the words "for hire," which practically disposed of the question which they had been considering about houses set up as a charity and where there was no hire. The Court of Appeal came to the conclusion that the definition not only applied to Ireland, but also explained the Common Lodging Houses Acts for the purpose of their interpretation in England. It does not quite appear how they arrived at it, but I think it must have been because the Acts of 1851 and 1853 are "declared and explained to have been intended to bear the following meanings." I think they must have been treating the Irish Act as declaratory of the meaning of the earlier Acts, and, the Legislature being the authority for both England and Ireland to declare what was the true meaning of Acts which applied to both, they seem to have treated it as declaratory of the meaning of those Acts for all purposes, and therefore held that the definition in the Irish Act applied to England. So far, therefore, as any previous decision had been based upon a definition of the expression "common lodging-house" which the Courts had made for themselves, it seems to me that they are displaced as soon as it is found that the Legislature had in 1860 declared the meaning of the Act of 1851, and declared it in a way differing from the view of the law officers when they said that the period of letting was unimportant. But so far as those decisions were based, not upon any definition which the Courts had made for themselves nor upon any special meaning which they attributed to the words "common" or "lodging-

1913

LONDON COUNTY COUNCIL v. HANKINS.

Channell J.

house," but upon the general construction of the Acts and consideration of their policy, it seems to me that they are unaffected by the discovery of the definition in the Irish Act and are binding upon us still. Moreover I think that this must have been the view of Cozens-Hardy L.J. in *Parker* v. *Talbot* (1), because otherwise the latter part of his judgment would to my mind be unintelligible. After saying that it was a necessary element in a common lodging-house that the accommodation should be let for hire he goes on to point out that the element of hire may co-exist with the element of charity, as where certain of the rooms or beds are let out for hire, and in addition poor persons, who are in want of the accommodation and have not the money to pay the hire, are admitted and given a lodging for nothing; and he proceeds to give illustrations of charitable institutions which would fall some within the Act and some outside it. He assumes that what was said by the Divisional Courts in *Logsdon* v. *Booth* (2) and *Logsdon* v. *Trotter* (3) applies to such institutions, and that although a definition of "common lodging house" not contemplated by those Courts has been discovered, yet so much of their decisions as was based not upon any idea of definition but upon the general construction and policy of the Acts remained. This view is to my mind much strengthened by what Mr. Drucquer in his very clear argument brought before us as to the way in which the matter has been dealt with in the Public Health Act, 1875. That Act, which extends to the country generally, but excludes the metropolis, contains a code, ss. 76—89, in reference to common lodging-houses, which is substantially the same as the provisions of the Act of 1851. Since 1875 the Common Lodging Houses Acts have been repealed except as to the metropolis, so that now the Public Health Act is the common lodging-house code for the country, while the Acts of 1851 and 1853 continue the code for London. But the Public Health Act in addition to the provisions relating to common lodging-houses contains in s. 90 provisions relating to houses let in lodgings. Those provisions are no doubt very similar, the object in both classes of lodgings

(1) [1905] 2 Ch. 643. (2) [1900] 1 Q. B. 401.
(3) [1900] 1 Q. B. 617.

being sanitary, but the Act treats the two classes as quite distinct subject-matters. Now that fact is very strong to shew that such a house as we are dealing with in the present case does not come within the term "common lodging-house" but does come within the term "house let in lodgings." No doubt the lodgings were let for hire for single nights or for periods of less than a week, but each lodger had a separate room and was given the key of it, so that he had an occupation of a certain character, and there were no rooms used in common at all. Then in 1891 the Public Health (London) Act was passed, which in s. 94 contains provisions almost identical with those in s. 90 of the Public Health Act. Therefore in London as well as in the country you find the Legislature applying one set of provisions to common lodging-houses and another set to houses let in lodgings, and that strongly confirms the view that those two classes of accommodation are treated as distinct things.

I now turn to the case in order to see what the magistrate decided and whether his decision was in our judgment right or wrong. For the respondent it was admitted that the houses were houses in which persons were harboured or lodged for hire for a single night or for less than a week at a time, or a part of which was let for a term less than a week, as in the case of *Parker* v. *Talbot* (1), but it was contended that nevertheless they were not common lodging-houses inasmuch as there was no community of eating or sleeping accommodation. The previous cases had indicated that it was not necessary that there should be community both of eating accommodation and also of sleeping accommodation, but I think it was always said that community of some kind was necessary, and the question is whether that is displaced by the decision in *Parker* v. *Talbot*. (1) The magistrate having that contention before him said he was of opinion that the definition was not exhaustive. Upon that question whether it was exhaustive, Vaughan Williams L.J. undoubtedly did point out in *Parker* v. *Talbot* (1) that the words of the Irish Act are "shall mean" and not "shall include," and Cozens-Hardy L.J. used language very much to the same effect: "Our attention having now been called to this Act of 1860, I am

(1) [1905] 2 Ch. 643.

1913

LONDON COUNTY COUNCIL v. HANKINS.

Channell J.

driven to the conclusion that we have here that which we could not find before, namely, a definition in the strictest possible sense of that word." As to whether it was exhaustive in one sense I am not so clear, but what I am clear about is that it was not exhaustive in the sense of excluding the interpretation that had been put upon the Act by reason of its general policy, and if that is the sense in which the magistrate used the term when he said that in his opinion the definition was not exhaustive I think that he was right. He then goes on to say that in his opinion the element referred to in the earlier cases must exist before the definition adopted by the Court of Appeal could apply, and that if the appellants' contention was correct s. 94 of the Public Health (London) Act, 1891, would be nugatory. Substantially I agree with that view of the magistrate, but I prefer to express my own view slightly differently, and instead of saying that the element of community must exist before the definition applies, I prefer to say that it may and does exist with it provided you can see that it arises from the general policy of the Act and not from any special interpretation of the words "common lodging-house." I think that the appeal must be dismissed.

ROWLATT J. The question is what is the meaning of the phrase "common lodging-house" as used in the Common Lodging Houses Act, 1851. It was decided in *Langdon* v. *Broadbent* (1) that it meant a lodging-house which was common in the sense of being open to all comers, including those of the lowest class, that being the class for which such a house was specially designed to cater. The phrase described an institution which was well known at the time of the passing of that Act, and the question is what are the essential characteristics the absence of which will prevent a house from coming within that category. Looking at the policy of the Act we see that in the first place it was designed to protect the public from various dangers likely to arise from the herding together of dirty people, including the spread of infectious disease. That being so, the opinion of the law officers which has been referred to treated the conception of

(1) 37 L. T. 434.

a common lodging-house as essentially involving, first of all, that the class of people that use it are very poor, and secondly that although they may not be members of the same family they use some of the rooms in common. The law officers treated those elements as essential, and their opinion in that respect was adopted by the Divisional Courts in the *Logsdon Cases*. We have then to consider how far that view is affected by the decision of the Court of Appeal in *Parker* v. *Talbot* (1) adopting the definition in the Irish Act, and deciding that the circumstance that no hire was paid for the accommodation prevented the house from being a common lodging-house. The definition in that Act seems to me to be directed to the particular kind of contract that exists between the person keeping the common lodging-house and the persons resorting to it, and to leave on one side many of the elements which obviously must have been intended to be taken into consideration in order to carry out the policy of the Act of 1851. It may possibly be for that reason that the Irish Act has been since repealed. At any rate I am clearly of opinion that the decision of the Court of Appeal does not overrule the law which was laid down in the *Logsdon Cases* as to the two essentials mentioned in the law officers' opinion there adopted. This I think is abundantly clear from the judgment of Cozens-Hardy L.J., where, dealing with the question whether the reception of persons into a lodging-house gratuitously will prevent it from being a common lodging-house, he says: "In the first place I think the persons receiving the benefit of the charity must be of the very poor and humble class, whose sanitary conditions call for special attention." By those words I understand him to mean that the charitable institution must fulfil the essential condition of a common lodging-house, namely, that it must be for the use of the very poor and humble class. He goes on to say: "That was the view taken by the law officers, to which my Lord has referred, and that has been throughout the view of those in charge," shewing that he adopts the opinion of the law officers as still being the law. Then he goes on to deal with the other essential condition: "In the next place I think the sleeping of members not of the same family in cubicles or beds

(1) [1905] 2 Ch. 643.

1913

LONDON COUNTY COUNCIL v. HANKINS.

Rowlatt J.

in a common room and having meals in a common room does not constitute a common lodging-house, unless such reception and accommodation can be deemed the substantial and main purpose of the charity," meaning, as I understand him, that although a house cannot be a common lodging-house unless there is community of eating or sleeping accommodation, the mere fact that it has such community of accommodation will not necessarily make it a common lodging-house if, as in the case of a hospital, the provision of such accommodation is only incidental to the purposes of the charity. So that notwithstanding the statutory definition he treats that element as still being an essential condition of a common lodging-house.

ATKIN J. In my opinion the law as to the meaning of the expression "common lodging-house" was definitely settled in *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter* (2), in which the Court adopted the definition given by the law officers. The effect of *Parker* v. *Talbot* (3) was not to displace that definition, but only to add to it two more terms; first it adds the term that the lodgings are to be lodgings for hire, and secondly it defines the short period mentioned in the law officers' opinion as being a single night or less than a week. Under these circumstances the question which we are asked to answer is whether the magistrate was right in saying that the statutory definition is not exhaustive. I think it clearly is not exhaustive for the reasons my brothers have given. I think the magistrate was right in saying that the element of community must exist before you can find that a house is a common lodging-house. I only wish to add that in arriving at the conclusion that the appeal must be dismissed I myself have been much assisted by the clear and terse argument of Mr. Drucquer.

Appeal dismissed.

Solicitor for appellants: *Edward Tanner.*
Solicitors for respondents: *Pierron & Ellis.*

(1) [1900] 1 Q. B. 401. (2) [1900] 1 Q. B. 617.
(3) [1905] 2 Ch. 643.

J. F. C.

HIGGS AND HILL, LIMITED *v.* STEPNEY BOROUGH COUNCIL.

1913
Dec. 15.

London—Building Operations—Hoardings for Protection of Passengers in Street—Necessity for Licence of Borough Council—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 121, 122, *and* 123—*Exemption of School Buildings—Education (Administrative Provisions) Act*, 1911 (1 & 2 *Geo.* 5, *c.* 32), *s.* 3.

The licence of the borough council under s. 122 of the Metropolis Management Act, 1855, for the erection of a hoarding in a street is required in the case of all hoardings erected under s. 121 of that Act.

Sects. 121, 122, and 123 of that Act are not provisions "dealing with the construction of new buildings" within the meaning of s. 3 of the Education (Administrative Provisions) Act, 1911, and school buildings though built in accordance with plans approved by the Board of Education are not exempted from their operation.

Case stated by a metropolitan police magistrate.

1. The appellants, Higgs and Hill, Limited, were summoned for having erected in the metropolitan borough of Stepney a certain hoarding without a licence in writing from the Borough Council of Stepney contrary to s. 123 of the Metropolis Management Act, 1855.

2. At the hearing the following facts were proved or admitted:—

(*a*) The appellants were contractors. By a contract dated September 18, 1912, the appellants were employed by the London County Council, as the education authority for the county of London, to demolish and clear away the old buildings upon a site in Underwood Street, Stepney, which had been acquired by the council under the powers of the Elementary Education Acts and to erect thereon pursuant to the statutory duty of the council new buildings for school premises in accordance with plans which under regulations relating to the payment of grants were required to be and had been approved by the Board of Education.

(*b*) For the purpose of executing the said works and to secure the safety of the public the appellants as such contractors for the London County Council on or about April 11, 1913, erected a hoarding on the public footway.

1913

HIGGS AND HILL, LIMITED v. STEPNEY BOROUGH COUNCIL.

(*c*) The hoarding which was in Underwood Street was 8 ft. high and 293 ft. 6 in. long, and was such a hoarding as is ordinarily erected by contractors when pulling down old buildings and erecting new ones. Some such hoarding was necessary for the public safety, and it would not have been reasonably practicable to carry out the contract work without some such hoarding.

(*d*) The appellants erected the hoarding without applying for or obtaining in that behalf the licence of the respondents, who were the council of the borough in which the said site was situate.

(*e*) The hoarding was not to the satisfaction of the respondents, and for the purposes of this case it may be taken that the respondents would have refused their licence for such hoarding.

3. The appellants contended:—

(1.) That the hoarding was erected under s. 121 of the Metropolis Management Act, 1855, and not under ss. 122 and 123.

(2.) That by s. 3 of the Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), the contract buildings, including the hoarding, were exempted from the provisions of the sections under which the information was laid.

(3.) That the London County Council and the appellants as their contractors were not subject to ss. 122 and 123.

4. The respondents contended that the hoarding fell within ss. 121, 122, and 123, and, by whomsoever it might be erected, required the licence of the borough council, and that no one was entitled within the metropolitan area to pull down or erect a house or building abutting on to any public thoroughfare without erecting a hoarding licensed by the local authority. They also contended that the provisions of the Education (Administrative Provisions) Act, 1911, did not apply to the present case.

The magistrate being of opinion that the appellants' contentions were wrong convicted them.

Ryde, K.C., and *Daldy*, for the appellants. A hoarding erected under s. 121 of the Act of 1855 (1) does not require the licence of

(1) By s. 121 of the Metropolis Management Act, 1855, "Every person who shall build . . . . or take down . . . . any house build-

the borough council under s. 122. It no doubt must be "to the satisfaction" of the council under s. 121, but that satisfaction need not be expressed beforehand in the form of a written licence, and further the council's satisfaction is only required with respect to the adequacy of the hoarding and not with respect to its position. Sects. 121 and 122 refer to different subject-matters and have different historical origins. The former, which is taken from the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 80, relates to the protection of passengers in the street from injury by falling building materials during the process of building or repairing a house. The latter, s. 122, is taken from s. 75 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), which provided that "No person . . . . shall erect . . . . in any street or other public place . . . . any hoard or scaffolding or place or erect any posts bars rails boards or other things by way of inclosure for the purpose of making mortar or of depositing or sifting screening or slacking any bricks stone lime sand or any other materials for building or repairing any house or

ing or wall . . . . or alter or repair . . . . the outward part of any house, building, or wall, shall in all cases in which the footway is thereby obstructed or rendered inconvenient, cause to be put up a proper and sufficient hoard or fence . . . . and shall continue such hoard or fence . . . . standing and in good condition to the satisfaction of the vestry or district board . . . . during such time as may be necessary for the public safety or convenience . . . . and every such person who fails to put up such hoard or fence . . . . shall for every such offence forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during the continuance of such default."

Sect. 122: "It shall not be lawful for any person to erect or set up in any street any hoard or fence or scaffold for any purpose whatever, or any posts, bars, rails, boards, or other things by way of inclosure, for the purpose of making mortar, or of depositing bricks, lime, rubbish or other materials, without a licence in writing first had and obtained from the clerk or surveyor of the vestry or district board."

Sect. 123: "If any person erect or set up in any street any hoard or fence or scaffold for any purpose whatever, or any posts, bars, rails, boards, or other thing by way of inclosure, for the purpose of making mortar, or of depositing bricks, lime, rubbish, or other materials, without a licence from the vestry or district board . . . . he shall for every such offence forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during the continuance of such offence."

1913

HIGGS AND HILL, LIMITED v. STEPNEY BOROUGH COUNCIL.

other tenement or erection or for other works or for any other purpose . . . . without leave or licence first had and obtained under the hand or hands of the surveyor or surveyors for the time being of the pavements" subject to a penalty for default. Those words "or for any other purpose" must be confined to something ejusdem generis with mixing mortar and depositing bricks, in other words using a portion of the street as a builder's yard. In *Davey* v. *Warne* (1) Alderson B., speaking of that section, said, "It appears to me that the Act extends to inclosures only." If that be so, presumably the same meaning is to be attributed to the words "for any purpose whatever" in s. 122 of the Act of 1855 notwithstanding certain sentences of the section are somewhat transposed. If the licence of the vestry would not have been required for the erection of such a hoarding as this before 1855 neither can it be so required now. The consolidation of s. 80 of the Act of 1847 and s. 75 of Michael Angelo Taylor's Act in one Act cannot affect their meaning. Moreover the provision in s. 121 that it shall be compulsory on the builder to put up a hoarding seems to be inconsistent with the prohibition in s. 122 against putting it up without the council's licence.

Secondly, this hoarding was exempt from the requirement of a licence by virtue of s. 3 of the Education (Administrative Provisions) Act, 1911. (2) The buildings, to the erection of which the hoarding was incidental, were new school buildings in course of erection in accordance with plans approved by the Board of Education. It has been held that the Metropolis Management Act, 1855, is a local Act, and ss. 121—123 of that Act are provisions dealing inter alia with the construction of new buildings.

Colam, K.C., and *Morton Smith*, for the respondents, were not called upon.

(1) (1845) 14 M. & W. 199.

(2) By s. 3 of the Education (Administrative Provisions) Act, 1911, "Any provisions in any local Act dealing with the construction of new buildings . . . . shall not apply in the case of any new buildings being school premises to be erected, or erected, according to plans which are under any regulations relating to the payment of grants required to be, and have been, approved by the Board of Education."

1913

HIGGS AND HILL, LIMITED v. STEPNEY BOROUGH COUNCIL.

CHANNELL J. In this case I am clearly of opinion that the appeal should be dismissed. Upon the first point my judgment is simply that the words in s. 123 of the Metropolis Management Act, 1855, "for any purpose whatever" mean what they say. Prima facie the word "whatever" means whatever, and it is only in the event of the context shewing that something less was intended that the Court is entitled to cut down its prima facie meaning. Upon the supposition that those words are to be given their full prima facie meaning there is to my mind nothing inconsistent between s. 121 and ss. 122 and 123. Sect. 121 says that "Every person who shall build or begin to build . . . . any house building or wall . . . . shall in all cases in which the footway is thereby obstructed or rendered inconvenient cause to be put up a proper and sufficent hoard or fence . . . . to the satisfaction of the vestry or district board of the parish . . . . and every such person who fails to put up such hoard or fence . . . . shall for every such offence forfeit a sum not exceeding 5*l.* and a further sum not exceeding 40*s.* for every day during the continuance of such default." That section obliges the putting up of a hoarding in all cases in which the footway is interfered with or rendered inconvenient by the building, and the footway is obviously rendered inconvenient if there is a danger of things falling from the building upon the heads of passers-by. The section does not in terms say that the satisfaction of the vestry shall be expressed beforehand by a licence, but there is nothing inconsistent with the section in a provision that such a licence shall be required. Then s. 122 says that "It shall not be lawful for any person to erect or set up in any street any hoard or fence or scaffold"—the word "scaffold" has not been previously mentioned—"for any purpose whatever without a licence in writing first had and obtained from . . . . the vestry or district board." Why should not those words mean for any purpose including that mentioned in the preceding section? Then comes s. 123, which enacts that "If any person erect or set up in any street any hoard or fence or scaffold for any purpose whatever . . . . without a licence from the vestry or district board . . . . he shall for every such offence forfeit a sum not exceeding 5*l.*, and a further sum

1913

HIGGS AND HILL, LIMITED v. STEPNEY BOROUGH COUNCIL.

Channell J.

not exceeding 40*s.* for every day during the continuance of such offence." Now that penalty happens to be the same as the penalty in s. 121, and we may perhaps credit the Legislature with having made it purposely the same. If it had been different there would have been a difficulty about the sections overlapping, and, as s. 123 clearly includes purposes not dealt with in s. 121, it might have been necessary to say that when the Legislature in s. 123 spoke of hoards or fences put up "for any purpose whatever" it must have intended to exclude the purpose in s. 121. But the penalty is the same and therefore that difficulty does not arise. If then these three sections had been enacted in this statute for the first time I am clearly of opinion that there would be no inconsistency between them. Then does it make any difference that the Metropolis Management Act, 1855, is in this respect a consolidation statute, and that s. 121 was taken from one earlier Act and ss. 122 and 123 from another? I think not. As the Act from which ss. 122 and 123 were taken was passed first, the subsequent enactment of s. 121 no doubt only has the effect of pointing to a special instance of the application of the general rule already laid down in the other two sections; but there is no inconsistency in its so doing. Moreover, we recently in this Court declined to adopt the suggestion that an Act should be construed differently according as it is a consolidation Act re-enacting clauses which had come into existence at different dates, or is an Act enacting the clauses in question for the first time. When you find an inconsistency in the clauses of a consolidating Act it may be proper to look at the respective dates of their first enactment to explain that inconsistency, but if there is no inconsistency the Court must interpret the Act as it stands without any regard to the dates of origin of its clauses. I now pass to the other point, which is that, although this licence would under ordinary circumstances be required for the erection of such a hoarding as this, it is in the present case rendered unnecessary by the fact that the new building which is being erected and in connection with which the hoarding was required is a school built under the authority of the Board of Education, who sanctioned the building of it by the county council as the local education authority within the borough. That depends

upon s. 3 of the Education (Administrative Provisions) Act, 1911, which says that "any provisions in any local Act dealing with the construction of new buildings . . . . shall not apply in the case of any new buildings being school premises to be erected, or erected, according to plans which are . . . . required to be, and have been, approved by the Board of Education." The question is whether the enactment in the Act of 1855, that every person who proposes to build a new building—not a new building of any kind whatsoever—but a new building which interferes with the footway shall put up a hoarding, contains a provision with respect to the construction of new buildings within the meaning of that section. I think the words "construction of new buildings" refer to the mode of construction of the buildings, and that the intention was to preclude the application to the buildings therein dealt with of the enactments in the London Building Act and similar local Acts which go to the mode of construction of new buildings, and not to preclude the application of enactments dealing with interference with the highway, which is all that the sections in question are directed to. Sect. 121 does not deal in any way with the construction of new buildings, but only with what is necessary to be done for the protection of the public from the consequences of those new buildings being erected. In my opinion the second point fails as well as the other, and the appeal ought therefore to be dismissed.

AVORY J. I am of the same opinion. I can see nothing inconsistent between a provision which requires any person who is building in such a way as to obstruct or inconvenience the footway to put up a hoarding subject to a penalty if he neglects to do so, and one which requires any person who wants to build in that way and wants to put up a hoarding to obtain the licence of the local authority for that purpose subject to a similar penalty if he fails to obtain it. Upon the second point I agree with what my Lord has said with reference to the Act of 1911, which exempts the local education authority from the provisions of any local Act dealing with the construction of new buildings, namely, that it is intended to apply only to local Acts dealing directly with the mode of construction of new buildings, and that

1913

HIGGS AND HILL, LIMITED v. STEPNEY BOROUGH COUNCIL.

Avory J.

it has no application to ss. 121—123 of the Metropolis Management Act, 1855, which are to be found among a group of sections dealing almost exclusively with the management of streets and starting with a provision that the vestries and district boards in the metropolis are to be the surveyors of highways. Each of those three sections deals with a matter affecting the management of the streets as distinguished from the management of the construction of buildings.

ATKIN J. I agree.

Appeal dismissed.

Solicitor for appellants: *Edward Tanner.*
Solicitor for respondents: *C. V. Young.*

J. F. C.

1913

Dec. 17.

ARNOLD *v.* JEFFREYS.

Practice—Trial by Jury—General Verdict—Further Question asked by Judge of Jury—Judgment entered in Accordance with Answer.

When upon a trial before a judge and jury the jury have once given a general verdict, the judge is not entitled to ask any further question of the jury for the purpose of ascertaining whether the ground of their verdict was one which there was evidence to support.

APPEAL from the Watford County Court.

The action was upon a solicitor's bill. The defendant had been plaintiff in an action of *Jeffreys* v. *Hawkins and Barnes*, and had employed the plaintiff Arnold to conduct the action on his behalf. The plaintiff in that action was unsuccessful, and the present plaintiff sued him for the costs of the action. The only defence was that the plaintiff Arnold had entered into an agreement with the defendant not to charge him any costs. The evidence in support of the defence was that both the plaintiff and one Landon, his managing clerk, had told the defendant before he gave the plaintiff his retainer that the action against Hawkins and Barnes would not cost him anything. There was no evidence of any

express authority by the plaintiff to Landon to make an agreement on his behalf that Jeffreys should not be charged any costs. The jury returned a general verdict for the defendant. At the request of the plaintiff's counsel the judge then asked the jury whether they found that there was an agreement made with the plaintiff personally or one with Landon, the managing clerk. The jury answered that they found the agreement was made with Landon. Thereupon the judge entered judgment for the plaintiff upon the ground that no authority to Landon to make the agreement on his employer's behalf could be implied, and that consequently, as there was no evidence of any express authority, the only defence failed. The defendant appealed upon the ground that after a general verdict the judge had no power to ask the jury any further question.

Coumbe, for the defendant. The jury having once given a general verdict were functi officio, and could not be inquired of further. In *Brown* v. *Bristol and Exeter Ry. Co.* (1) Martin B. said that after such a verdict it was improper for any purpose to ask the jury any other question, even if, there being several counts in the declaration, the question was directed to ascertaining on which of the counts the jury had given their finding. He said "The duty of the judge is to sum up the case correctly to the jury, and after having summed up his duty is over, and it is for the jury to find a verdict." Further, apart from the impropriety of the question asked of the jury in the present case, the judge was wrong in entering judgment as he did, for when once a verdict has been given there is no power to enter judgment the other way on the ground that there was no evidence to support the finding : *Perkins* v. *Dangerfield.* (2)

Lilley, for the plaintiff. This case is an illustration of the inconvenience arising from the practice in the county courts of having no pleadings. If such a defence had been set up in an action in the High Court the plaintiff would have asked for particulars, and the defendant would have had to state whether the agreement was made with the principal or with the clerk, and if he had alleged that it was made with both, the plaintiff

(1) (1861) 4 L. T. (N.S.) 830. (2) (1879) 51 L. T. 535.

1913

ARNOLD v. JEFFREYS.

would have replied that so far as an agreement made with the clerk was concerned the clerk had no authority to make it. If after that a general verdict had been found the jury might be asked on which count they had so found. The case of *Brown* v. *Bristol and Exeter Ry. Co.* (1) is not an authority to the contrary, for Bramwell B. there disagreed with Martin B. on this point, and, being apparently under a mistaken apprehension as to the ground on which Martin B. at the trial refused an application to put a further question to the jury, said: "We think therefore that my brother Martin was right in refusing the application which he understands was made to him, not to ascertain on what counts the plaintiff was entitled, but on what ground the jury had come to the conclusion they did." He was clearly of opinion that after verdict the judge might ask the jury on which count they had found, and that is substantially what the jury were asked here, only owing to the absence of pleadings it had to be done in another form. The Court is invited to agree with Bramwell B. and not with Martin B.

BRAY J. I agree with the view of Martin B. in *Brown* v. *Bristol and Exeter Ry. Co.* (1) and think the judge here was wrong in asking the jury a special question after they had given a general verdict. It may be conceded that if a judge has left several specific questions to the jury and they have answered them he may afterwards, notwithstanding that they have given their verdict, ask them a further question; but it is otherwise where the verdict is general. The case should go back for a new trial.

LUSH J. I agree. In criminal trials it is clear that when once a general verdict has been given there is an end of the matter, and I think the same rule applies in civil trials.

Appeal allowed.

Solicitors for plaintiff: *Church, Adams & Prior, for M. Arnold, Watford.*

Solicitor for defendant: *S. W. Hack.*

(1) 4 L. T. (N.S.) 830.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1913 *Dec.* 1.

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Undeveloped Land Duty—Agricultural Land—Lease made before April 30, 1909—*Power to determine Tenancy for certain Purposes—Conditional Power—Lessor not desirous to resume Possession—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 17, *sub-s.* 5.

By s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910, "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into before April 30, 1909, undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder. Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

In the absence of any bona fide intention of using the land for building or other purposes the lessor of agricultural land, held under a lease made before April 30, 1909, and containing a power for him to re-enter for building or other purposes, has no power to determine the lease within s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910; and the land is consequently not liable to undeveloped land duty.

By a lease of December, 1906, agricultural land was demised from September, 1904, for seven years. The lease continued a reservation to the lessors of "full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land." The Crown claimed from the lessors undeveloped land duty for the years 1910-11 and 1911-12 on the land comprised in the lease on the ground that they had "power to determine the tenancy" within the proviso to s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910. It was admitted that the lessors had not wanted any part of the land "for building or other purposes" before the termination of the lease:—

Held (reversing the decision of Scrutton J.), that inasmuch as the lessors had had no bona fide intention of using the land, the condition had not been fulfilled, and they had no power to determine the tenancy within s. 17, sub-s. 5.

Appeal from a decision of Scrutton J.

By a lease dated December 4, 1906, the Southend-on-Sea Estate Company, Limited, leased to W. Bentall certain agricultural lands for a term of seven years from September 29, 1904.

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

It was a farming lease with farming covenants, and it also comprised the following provision :—

"And also reserved to the lessors full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land coloured blue on the plan (including a right of way over the Wick chaseway where adjoining the land taken) on giving to the lessee one calendar month's notice in writing and (if and when land on the south side of Southchurch Road opposite the chaseway to the Wick shall be so taken) leaving for the lessee a cartway thereover to afford access to the land to the south thereof which may remain subject to this lease the lessors allowing for all land taken for any of the purposes aforesaid an abatement from the rent at the rate of two pounds per acre."

The lease remained in force during the whole of the term.

Provisional valuations of the land were served on the company on February 2, 1912, and the site values had been agreed. On April 12, 1912, notices of assessment and notices to pay undeveloped land duty for the years 1910-11 and 1911-12 were served on them. The company appealed against the assessment.

The appeal was heard by the referee on May 25, 1913, when the Commissioners admitted that the company had not wanted any part of the land for any purpose before the determination of the lease in September, 1911. On this admission being made the company called no evidence, and the referee held that the company had power to resume possession of the land and were therefore liable to pay undeveloped land duty. The company filed a petition by way of appeal on the ground that "the land is agricultural land held under a tenancy originally created by a lease made before the 30th day of April, 1909; that the tenancy continues thereunder, and that we have no power to determine the tenancy of the whole or any part of the land."

Scrutton J. affirmed the decision of the referee and dismissed the appeal.

The company appealed.

J. A. Hawke, K.C., and *William Allen*, for the appellants. The land comprised in the lease is exempted by s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910 (1), from payment of undeveloped land duty before the termination of the lease in September, 1911. It is agricultural land which at the time of the passing of the Act was held under a tenancy created before April 30, 1909, and the landlords had no power to determine the tenancy. "Possible to determine" means a legal power to determine, a power which the landlord can enforce. If a condition is attached to the power and that condition has not been fulfilled the power does not arise. Here the power is to re-enter "for building or other purposes"; and it is admitted that the lessors did not want any part of the land for those purposes before the end of the term. Therefore there never has been a power to re-enter. The words "or other purposes" mean purposes ejusdem generis with "building." To make the power effective there must be a bona fide intention to build, although the lessors need not do the building work themselves: *Doe* d. *Wilson* v. *Abel.* (2) A merely colourable intention is not sufficient: *Russell* v. *Coggins* (3); *Johnson* v. *Edgware, &c. Ry. Co.* (4) The last-mentioned case also shews that the words "or other purposes" mean ejusdem generis with "building." It is said that that doctrine does not apply because the word "building" is used alone. But "building" includes a great number of different operations and the rule applies: *Truman, Hanbury, Buxton & Co.* v. *Inland Revenue Commissioners* (5); *Attorney-General* v. *Seccombe.* (6)

(1) Finance (1909-10) Act, 1910, s. 17, sub-s. 5: "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into before the thirtieth day of April nineteen hundred and nine, undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder. Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

(2) (1814) 2 M. & S. 541.

(3) (1802) 8 Ves. 34.

(4) (1866) 35 Beav. 480; 14 L. T. 45.

(5) [1912] 3 K. B. 377, 402.

(6) [1911] 2 K. B. 688, 702.

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Sir J. Simon, A.-G., and *W. Finlay*, for the Crown. No question as to the doctrine ejusdem generis arises. The Crown has made admissions in order to avoid that difficulty. It may be taken that the lessors did not want the land, but if they had wanted it they could have entered, and that is enough to bring them within the proviso to s. 17, sub-s. 5, which refers to the power to enter, not to the wish to exercise the power. Undeveloped land duty is designed to fall on land which is used for agricultural purposes when it might be used to much greater advantage and be worth much more. In some cases a lessor cannot resume possession of land which he has let to another, however much he may wish to do so, and therefore cannot use it otherwise than as agricultural land, and s. 17, sub-s. 5, is intended to meet his case. It is not suggested that a landlord ought to pretend to do something which he is not really doing. The question is whether he can do it if he wishes. Whether it would be reasonable to build houses now is beside the point. The test is that the fulfilment of the condition depends on the volition of these landlords, and they could exercise the power whenever they liked. They had the power to re-enter if they had the intention to do so. The cases which have been cited shew that they could have re-entered if they proved their intention to build either personally or through others. That they had not the intention does not shew that they had not the power to determine.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of Scrutton J. raising a curious point under s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910. The question is whether the land comprised in this lease is liable to undeveloped land duty. It is quite unnecessary, I trust, for me to say that we have nothing whatever to do with the policy of the Act; our only duty is to construe the language used as best we can, always remembering that it is for the Crown to make out that the subject is liable to taxation.

Sect. 16 imposes undeveloped land duty, and it defines what is undeveloped land. There are special provisions in reference to agricultural land. By s. 17, sub-s. 1, no land which is not

worth 50*l.* per acre is liable, subject to certain conditions and qualifications. Then in s. 17, sub-s. 5, there is a proviso which is peculiar. The tax was imposed for a year or more prior to the Act coming into operation. For taxing purposes it is necessary to go back to April 30, 1909, although the Act in question did not come into operation till a considerably later period. Given agricultural land which would come within the definition in s. 16 of undeveloped land, that is to say, "land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glasshouses or greenhouses), or is not otherwise used bona fide for any business, trade, or industry other than agriculture," prima facie we have to consider what is the position of land which is worth more than 50*l.* an acre but is land upon which no buildings have been erected and which has not been really developed for the purpose of building and so on. There is a clause in s. 17, sub-s. 5, which has to be construed. It contemplates a case—I will read the language immediately—where the landlord cannot get possession of land which is in the hands of a tenant under a lease prior to April, 1909. The whole sub-section deals only with leases prior to that date, so that it is not of quite such lasting general importance as it might otherwise seem to be.

Sub-s. 5 is: "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into before the thirtieth day of April nineteen hundred and nine, undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder." The lease which I shall have to call attention to was granted in 1906 for seven years from 1904, which expired in 1911, and the tenancy continued up to that date. Then there is this proviso: "Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

Act at which it is possible to determine the tenancy under that power."

Now in the present case the lease was a seven years lease of land which admittedly was then, and is now, purely agricultural land, and it consists of two or three large farms. The rent was variable according to the price of wheat, all the covenants are covenants by agricultural tenants, and the covenants by the landlord are such and such only as one would find in a lease of that kind.

But there is this provision which I must read carefully. After the parcels it is provided as follows: "Also reserved to the lessors full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land coloured blue on the plan (including a right of way over the Wick chaseway where adjoining the land taken) on giving to the lessee one calendar month's notice in writing," and then there is a provision that for the land so taken away there shall be an abatement of rent of 2*l.* per acre.

Now what is the effect of that reservation? It gives the landlords power to re-enter not at their own will and pleasure; it is not in any degree a lease which authorizes them to re-enter whenever they choose, whenever they are minded to do so, at their own will and pleasure. It would not be enough for them to issue a writ simply saying, "You are tenants at will subject to a month's notice"; there must be a definite purpose for which they want to resume; it must be to enter and resume possession for building or other purposes. For my part I attach no importance at all to the consideration of whether those words "or other purposes" are ejusdem generis: either way it seems to me the result must be just the same. Unless the landlords can say, "We want to resume possession for a purpose inconsistent with the enjoyment of the farm or a portion of the farm for agricultural purposes," it seems to me that they have no right whatever to resume possession. And in fact if they simply said, as we now know by the Attorney-General's admission they must be taken to have said, "Mind you, we do not require the land for any purpose which would be inconsistent

with your enjoyment as a farmer," it seems to me quite plain that the right to resume possession never arose. The power did not become exercisable—it was only a power to arise in an event which has never happened, namely, the desire and the intention of taking possession of it for some purpose other than and inconsistent with the agricultural purpose in the lease.

But then it is said, "they have a power under the express terms of the lease and they might have desired to cover this land with buildings or they might have desired to turn it into a golf course or use it for any other purpose"; and it is said, "the meaning of this clause is that there is a power which they might exercise if they had that intention and that purpose which in fact they had not, and therefore the case comes within the proviso to sub-s. 5."

I am entirely unable to assent to that view. I think this is a case in which, in accordance with the settled law more than one hundred years old, the landlord could not at any moment between April, 1909, and the time of the end of the lease have resumed possession, because on the evidence that was given, and to the extent of the admission that was made, there would undoubtedly have been judgment for the defendant.

In the old days when law and equity were separate, it may be that judgment would have been recovered in an action at law—I am not sure; I only say it may be—but, even if it could, Sir William Grant's decision in *Russell* v. *Coggins* (1), to which our attention has been called, seems to me quite clear. There the defendant said he wished to have the land for building. It was not colourable, for he had entered into a treaty. This was a case which I gather was heard upon the frank admissions of the defendant. There was no mala fides in that sense. What Sir William Grant said was (1): "The intention could never be, that he should be at liberty to come, and say, he wants it, without the least proof, that it is wanted. In this instance he says something more; that he applied to the plaintiff; stating, that he wished to have it for building; and that it was not colourable; for he had entered into a treaty: if he had said, an agreement, there would have been an end of it. There is no defence at law. The

(1) 8 Ves. 34.

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

question therefore, whether the land was bona fide wanted, can only be here; and it is not so clear, that the defendant did want it, that he ought to be permitted to proceed at law; where he must inevitably succeed. I am clearly of opinion, that he has not shewn, that it is wanted; and therefore shall grant this injunction."

I am not going to express a concluded view as to whether in the old days an action at law could have been maintained and whether it would have been necessary to apply to the Court of Chancery to interfere, but at the present time that is quite immaterial. In my view the difficulty which the Attorney-General has not got over is that he has not shewn that there was in fact any moment of time between 1909 and the expiration of the lease when the landlords could have resumed possession of this property. That being so, the case does not fall within the proviso to sub-s. 5, but does fall within the first part of sub-s. 5.

For these reasons, with great respect to Scrutton J., who took a different view, I think the appeal succeeds and must be allowed accordingly.

I should like to add that I have looked at the decree in the case of *Russell* v. *Coggins* (1), and the lease is stated by the reporter quite accurately with the exception that there was no lease under seal. It was an annual agreement for a lease, so that in law it would be only a tenancy at will, and that is what Sir William Grant meant when he said there would be no defence at law. The decision on the construction of the covenant is just as good in the one case as in the other.

SWINFEN EADY L.J. The question raised is whether undeveloped land duty is payable in respect of certain land comprised in a lease for a period ending September 29, 1911. The land in question was comprised in a lease which was in existence from 1906, although the term ran from September 29, 1904. It was a lease for seven years expiring Michaelmas, 1911. The land was agricultural land within the terms of s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910: "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into

(1) 8 Ves. 34.

before the thirtieth day of April nineteen hundred and nine,"—that is this case—"undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder." Until September 29, 1911, the original term existed and the tenancy in fact continued thereunder. Then comes the proviso: "Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

The lease in question was a lease for a fixed term. There was no power to determine it except upon the occasion to which I will refer. It was a lease of a farm near Southend—we are told about two miles from Southend—containing 504 a. 13 p., at a rent of 850*l.* a year, varying with the price of corn. And there is "reserved to the lessors full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land coloured blue on the plan . . . . on giving to the lessee one calendar month's notice in writing," the lessors allowing for all land taken an abatement from the rent at the rate of 2*l.* per acre.

Now this is manifest from the language of the lease. It contemplated that the lessors might enter at any time and from time to time; that they might enter on the land piece by piece, as occasion might arise, when they wanted certain land. It is "at any time and from time to time," they may take "any part or parts of the land coloured blue," and the abatement is merely an acreage abatement in rent of 2*l.* per acre. That is the only power that they have.

The admission made by the Crown was that the lessors did not want the land for building or any purpose within the meaning of the lease. Then the Attorney-General admitted quite frankly that the concession was meant to cover this, that the lessors had no intention of building and did not require the land, and had no intention of using it for any other purpose. That is definite.

In substance I understood the Attorney-General's argument to

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

be this: that although the lessors had not any intention of building or using the land for any other purpose, yet, by an effort of will, by mere volition, they might have possessed such an intention; and therefore they should be taxed as if they had the intention, as otherwise by mere volition or absence of volition they would avoid the payment of the tax. In substance that was the argument put forward. Mr. Finlay, who followed him, put the case as if there were a simple power to determine on giving a month's notice, and the way it was argued was this: "At any time the lessor may give the month's notice; he may if he pleases acquire the intention of building; by mere volition on his part he can put himself in the position of being able to give the notice; in fact by an effort of will he may be in a position at any time to give the notice; therefore the Court has to treat him as if he were always in a position to give the notice, and as if he could determine the lease by a month's notice at any time if he chose so to do; that if he omits to do so, he cannot escape being treated as if the lease were determined, for he had the power to determine, and that is sufficient for the purpose of undeveloped land duty."

In my opinion that is wholly fallacious. By mere volition alone he cannot acquire a bona fide intention of building. Bricks, mortar, and timber are necessary and they must be paid for. A person may wish, heartily wish, to build and be very desirous of building, but he may not have the means of doing so, and he may have no intention whatever to build, although if he had the means he certainly would intend to build.

In this case the power is to resume possession for building or other purposes. The result in point of law is this, that the lessors cannot determine the lease when they choose but can only determine it and resume possession if they have a bona fide intention of using the land for building or other purposes within the lease. It would not be open to them to say as mere matter of form "We wish to build and therefore we will give you notice," they must have a bona fide intention of building.

That is not new law. Lord Ellenborough in the King's Bench said the same one hundred years ago in *Doe* d. *Wilson* v.

Abel. (1) It was an ejectment for land tried before Lord Ellenborough. A verdict was found for the plaintiff subject to a case stated. The lessor of the plaintiff alleged a demise with a covenant amongst other things "that if the lessor or person entitled to the freehold or inheritance should be desirous at any time during the term to take all or any part of the land demised for building thereon," then there was a power on giving six months' notice so to take. The lessor did intend building. Notice was given, and when the land was not surrendered ejectment was brought. The question was whether the plaintiff should be entitled to recover. Lord Ellenborough put it in this way (1): "The covenant is clearly and expressly, that if the lessor shall be desirous to take all or any part of the land for building &c., that is, if the whole or any part should be wanted for the purposes of building, she may enter for such purpose, and for all necessary acts, without interruption by the defendant upon giving six months' notice of her intention. 'Should be desirous' certainly means that she should be bona fide desirous and she must intimate such her desire by six months' notice." That is to say, it is not sufficient to have a mere wish to do this or that; she must have a bona fide intention, she must bona fide require the land either for building or for a definite purpose.

It is for the Crown to make out their case for the duty, and not only have the Crown failed to shew that the lessors had any power to determine the lease in the events that have happened, but the admissions shew that the lessors had no such power. In the absence of any bona fide intention of requiring the land for building or for other purposes within the lease they had no power whatever to determine, and it is not a case where, if they chose, they could give notice at any time.

In my opinion the judgment in the Court below should be reversed.

PHILLIMORE L.J. In this case the Crown establishes that this was and is undeveloped land and therefore subject to duty under s. 16 unless it is freed from the duty under ss. 17 or 18. It is not

(1) 2 M. & S. 541.

C. A. 1913

SOUTHEND-ON-SEA ESTATES COMPANY LIMITED v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

freed by s. 18 and it is not freed by sub-ss. 1, 2, 3, or 4 of s. 17. The question is whether it is freed by sub-s. 5 of s. 17. That is a sub-section which excepts certain land from the operation of the duty, and upon that exception there is a proviso. The land comes under the exception; the question is whether it comes also under the proviso, in which case the exception ceases.

The words of the proviso are: "Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

It has been suggested—I do not know that it has been fully argued on behalf of the Crown; perhaps it was not necessary—that this proviso applies whenever there is power from any cause arising in any way to determine the tenancy. If, for instance, there had been a breach of covenant upon which the landlord could re-enter, even supposing it was one of those breaches for which compensation could be given on the application of the tenant; at any rate if it was one for which the tenant could not offer compensation, it has been suggested that this power would still apply. I asked at the end of the argument, what would happen if the power to determine was only with the intention of using the land for some purpose which would not be development, and I was told, perhaps hastily, that the power would still arise, and that therefore the power of the landlord, for instance, to determine the tenancy of a piece of the land to make a golf course would operate and make this taxable as undeveloped land, although the only purpose for which he could determine the lease would be a purpose inconsistent with development.

It is not necessary, however, to decide this case upon any question as to how far the statute goes. For the purpose of my decision I assume, without in the least saying I agree to it, that the argument of the Crown is quite right and as far-reaching as anybody has suggested in the course of this argument. I will assume for the purposes of this decision that, wherever the landlord has for any purpose power to determine, however hard it would be upon the tenant, nevertheless the landlord comes under

the exception. Still, I am of opinion that the Crown fails. I do not think that the landlord here had the power to determine the tenancy of the whole or any part of the land. That depends upon the construction of the lease coupled with the admission of the Attorney-General.

Now the lease says that there is power to enter and resume possession for building or other purposes of a certain part of the land on giving one calendar month's notice. In my view that is not a power to get possession at any time by simply giving one calendar month's notice in writing. This is not a lease determinable at a month's notice, still less a lease determinable as to a part or parts at the lessor's option at a month's notice; it is a lease determinable at a month's notice if certain conditions are fulfilled. There must be a purpose.

The Attorney-General admitted that the lessors did not want the land for any purpose. In my opinion they had not the power unless they had the purpose. By "purpose" I mean an intention or a plan to use the land for a particular object, and I think the purpose must be with regard to the use of the land. I do not think that this company could determine the lease of all or such parts of this land as they thought it would be most annoying to determine the lease of, because they disagreed with the politics or the religion of the farmer. I think it must be a purpose connected with the use of the land, and my answer to the whole argument, which was very carefully developed by the Attorney-General and Mr. Finlay, upon this point is this: It is not a case where the power can be exercised when there is no intention to use the land when the power has been exercised. The power here only arises when there is the intention, and we must look at this matter as between the landlord and the tenant; if the landlord cannot exercise the power, then there is no tax; and the landlord in my opinion could not, in the circumstances admitted here, exercise the power. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Dennes, Lamb & Pearce Gould, for Dennes, Lamb & Drysdale, Southend-on-Sea; Solicitor of Inland Revenue.*

H. C. R.

C. A.
1913
Dec. 1, 2, 8.

[IN THE COURT OF APPEAL.]

HAYLLAR *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Increment Value Duty—Substituted Site Value—Interest in Land—Mortgage—Mode of Calculation—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 2, 25.

For the purpose of obtaining the substitution of a previous site value for the original site value ascertained under s. 25 of the Finance (1909-10) Act, 1910, the amount secured by a mortgage must not be treated as a means of inferring what was the gross value of the mortgaged land, but must itself be taken to be that value.

The original site value of the applicants' freehold house had been ascertained under s. 25 of the Finance (1909-10) Act, 1910. The original gross value was 800*l.* and the deductions to arrive at full site value were 610*l.*, leaving the original site value 190*l.* In December, 1898, the applicants had mortgaged the house for 800*l.*, and they now claimed under s. 2, sub-s. 3 (1), that the value of the house at that date

---

(1) Finance (1909-10) Act, 1910, s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April nineteen hundred and nine, and—

"(*a*) on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land . . . . the duty, or proportionate part of the duty, so far as it has not been paid on any previous occasion, shall be collected in accordance with the provisions of this Act."

Sect. 2: "(1.) For the purposes of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation.

"(2.) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—

"(*a*) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer; and

"(*b*) where the occasion is the grant of any lease of the land, or the transfer on sale of any interest in the land, the value of the fee simple of the land, calculated on the basis of the value of the consideration for the grant of the lease or the transfer of the interest . . . .

"(3.) Where it is proved to the Commissioners on an application

was 1200*l.*, on the footing that the mortgagees were trustees, and that it must be assumed that not more than two-thirds of the value were advanced on the security of the house. They contended that 1200*l.* was the original gross value of the house and that 273*l.* ought to be substituted for 190*l.* as the site value :—

Held (reversing the decision of Scrutton J.), that on the true construction of s. 2, sub-s. 3, of the Finance (1909-10) Act, 1910, the amount secured by the mortgage, namely, 800*l.*, must be taken as the gross value of the property at the date of the mortgage.

APPEAL from a decision of Scrutton J.

The special case stated by the referee found that by provisional valuations two messuages and premises known as 62 and 64, Tisbury Road, Hove, in the county of Sussex, were valued as therein mentioned at 1600*l.* and the original site value at 380*l.*

The said provisional valuations were duly served on March 29, 1912, and the total and site values therein stated became, pursuant to s. 27 of the Finance (1909-10) Act, 1910, the original total values and original site values of the said premises therein mentioned for the purpose of Part I. of the Finance (1909-10) Act, 1910.

On June 4, 1912, application was made to the Commissioners by Florence H. Hayllar and others to substitute, for the purposes

---

made for the purpose within the time fixed by this section that the site value of any land at the time of any transfer on sale of the fee simple of the land or of any interest in the land, which took place at any time within twenty years before the thirtieth day of April, nineteen hundred and nine, exceeded the original site value of the land as ascertained under this Act, the site value at that time shall be substituted, for the purposes of increment value duty, for the original site value as so ascertained, and the provisions of this Part of this Act shall apply accordingly.

"Site value shall be estimated for the purposes of this provision by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such a transfer after the passing of this Act.

"This provision shall apply to a mortgage of the fee simple of the land or any interest in land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration.

"An application for the purpose of this section must be made within three months after the original site value of the land has been finally settled under this Part of this Act."

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

of increment value duty, for the original site value of 190*l.* in each of the above provisional valuations mentioned, the site value of the land at the time of a mortgage dated December 22, 1898, and made between Emma Hayllar of the one part and Ellen Robins and George Frederick Attree of the other part, being a mortgage for 1600*l.* on the security of the said two messuages Nos. 62 and 64, Tisbury Road aforesaid.

On that application it was admitted that the value of each of the said messuages at the date of the mortgage was the same, and that if the site value at that date of either of the said messuages was to be calculated by making deductions from the sum of 800*l.* only, that is, from half the amount secured by the mortgage, then such site value duly calculated pursuant to the provisions of s. 2, sub-s. 3, of the Finance (1909-10) Act, 1910, in accordance with s. 2, sub-s. 2 (*b*), of that Act, was in fact no more than 190*l.* and therefore did not exceed the original site value of the land.

The applicants contended that the aforesaid provisions of s. 2, sub-s. 3, required the Commissioners to estimate the site value at the date of the mortgage by making deductions in accordance with s. 2, sub-s. 2 (*b*), aforesaid from 1200*l.* for each house instead of 800*l.*, and they contended that the estimate under the said s. 2, sub-s. 3, of the site value by reference to the amount secured by the mortgage required the Commissioners to have regard not merely to the amount secured by the mortgage, but to other circumstances, and they further contended that, on all the facts and circumstances of the case and the law applicable thereto, the sum of 273*l.* should be the sum to be substituted for the original site value under s. 2, sub-s. 3, in respect of such messuage.

The circumstances which they contended the Commissioners were to take into account were that loans were not usually made on mortgage up to the value of the property, but with a margin of value above the amount secured, that the mortgagees under the said indenture of mortgage were trustees (and this the referee found as a fact) and that the mortgage money was advanced out of moneys which they held as trustees (which the referee also found as a fact), and that it was to be presumed that they did not, in breach of their duty, advance more than two-thirds of

the value of the mortgaged property. The referee also found as a fact that the market value of each house was 1200*l.* at that date, and, if it was competent for him to deduce a site value according to the condition of the property and the market values in 1898 from the figure of 1200*l.*, he found such site value to be 273*l.*, and that the applicants on that basis were entitled to have this sum of 273*l.* substituted for 190*l.* in reference to each house for the purposes of increment value duty.

The referee also found that the subject-matter of the mortgage of 1898 was an interest in land within the Finance (1909-10) Act, 1910, inasmuch as each house was mortgaged subject to existing tenancies, but the tenancies in question were yearly tenancies at a rack rent.

The Commissioners were of opinion that in estimating site value for the purpose of s. 2, sub-s. 3, of the Act in the case of a mortgage of an interest in the land they were required to take the sum secured by the mortgage, namely, 1600*l.* for the two houses and 800*l.* for each house, and only to add thereto any value which the fee simple of the land (on the basis that 1600*l.* was paid for the interest in that land) had in excess of 1600*l.* They were further of opinion that by reason of the facts stated in the preceding paragraph the value of the fee simple of the land did not exceed the value of the interest, the subject-matter of the mortgage. They were further of opinion that, making deductions from 800*l.* for each house as required by law to arrive at substituted site value, such substituted site value would not, according to the condition of the property and market values in 1898, have exceeded 190*l.*, and they therefore refused the application.

On July 1, 1912, the applicants gave notice of appeal against such refusal of the Commissioners, and the appeal was heard before the referee on January 28, 1913.

The referee was of opinion that the Commissioners correctly interpreted the meaning of s. 2, sub-s. 3, of the Act in relation to this mortgage, and that the claim made by the applicants that the section required the Commissioners in estimating site value by reference to the mortgage money to take into account the presumable, and in this case proved, excess in value of the

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

property at the date of the mortgage, over and above the amount secured, was not well founded. He accordingly decided that the contention of the appellants was erroneous and that the Commissioners rightly refused to substitute under s. 2, sub-s. 3, of the Finance (1909-10) Act, 1910, for the purposes of increment value duty as regards either of the said two messuages a site value exceeding the original site value as ascertained for the purpose of Part I. of the Act.

But if in the opinion of the Court the contention of the applicants was correct, then the referee decided that the sum of 273*l.* should, as regards each of the said messuages, be substituted under s. 2, sub-s. 3, of the Act, for the purposes of increment value duty, for the original site value thereof.

The applicants appealed, and Scrutton J. held that their contention was right and that 273*l.* ought to be substituted for 190*l.* as the original site value.

The Commissioners of Inland Revenue appealed from this decision.

Sir J. Simon, A.-G., Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the appellants. On the true construction of the Act the amount secured by the mortgage (taking one house to represent both), namely, 800*l.*, ought not to be treated as a means of inferring what was the gross value of the mortgaged land on the occasion of the mortgage, but must itself be taken to be that value. Increment value duty is imposed by s. 1 and is defined by s. 2, sub-s. 1. The assessable site value is worked out under s. 25. By s. 1 the duty is to be levied on the occasions of sales, leases, deaths and periodical occasions in the case of land held by bodies corporate or unincorporate; and by s. 2, sub-s. 2 (*b*), the site value on a transfer on sale of an interest in land is the value of the fee simple calculated on the basis of the value of the consideration for the transfer of the interest. By sub-s. 3, where it is proved that the site value on an occasion which has taken place within twenty years before April, 1909, exceeded the original site value under the Act, the site value at that time is to be substituted for the value ascertained under the Act. Site value is to be estimated in the same manner as it is estimated by

reference to the consideration given on a transfer; and "this provision shall apply to a mortgage of the fee simple of the land or any interest in land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration." If in this case the occasion had been a sale of the fee simple for 800*l.*, the gross value would have been 800*l.* under s. 2, sub-s. 2 (*a*): *Lumsden* v. *Commissioners of Inland Revenue* (1); and inasmuch as a mortgage is to be treated in the same way, and the amount secured is to be taken to be the consideration, 800*l.* must in this case also be the gross value. By s. 41 "fee simple" means the "fee simple in possession not subject to any lease," and "interest" includes a reversion on a lease. In this case the property was mortgaged subject to a yearly tenancy at a rack rent, and the fee was of the same value as the "interest in land" which was mortgaged; so it makes no difference in the calculation. The fee simple had no value in excess of the 800*l.* If this occasion had been a sale it would have been a sale not of the fee simple but of an interest in the land. There is no difference in value between the two. There is nothing in the Act which supports the contention that the amount secured by a mortgage is to be taken merely as evidence of the value on the occasion. The Act says plainly that it is to be taken as being equivalent to the value. The reason why the amount secured is taken as the value is that on a mortgage the whole of the fee simple is transferred; otherwise the mortgagee could not sell it.

E. P. Hewitt, K.C., and *W. Allen*, for the applicants. The referee found as a fact that the market value of the house on the occasion of the mortgage was 1200*l.*, and it is submitted that that is the sum to be taken as the gross value, and that 273*l.* ought to be substituted for 190*l.* as the site value. The mortgage money was on the face of the deed lent by trustees and they would not have advanced more than two-thirds of the value of the property. The object of s. 2 is to protect the owner if there is a recovery in value by ascertaining the true value on the occasion. Sect. 2, sub-s. 1, speaks of value "as ascertained under this section," whereas

(1) [1913] 3 K. B. 809.

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

s. 2, sub-s. 3, says "ascertained under this Act," which shews that the substituted amount is to be the true value, not a value arbitrarily fixed. Sub-s. 3 says the figure is to be arrived at "by reference to the consideration," not that the consideration is itself the amount to be taken. The appellants' argument is inconsistent with *Lumsden* v. *Commissioners of Inland Revenue*. (1) Under s. 25 gross value is the value of the fee simple if sold in the open market free from incumbrances. That is in this case 1200*l*., the amount fixed "by reference to the consideration," and from that amount the full site value is ascertained by deducting buildings, timber, and so on. If the amount secured is to be the actual value the object of s. 2 will be defeated.

Sir S. O. Buckmaster, S.-G., in reply. Sect. 2 was not designed to remedy grievances except in particular cases and by special means. The applicants have to prove an increase of site value or they will not get substitution. There is no question here about the value of deductions. The question is what is the figure from which deductions have to be made, namely, the figure at which the property changed hands. The Act says clearly that on a mortgage that figure is the amount secured.

Cur. adv. vult.

Dec. 8. COZENS-HARDY M. R. This appeal raises a question as to the mode in which "substituted site value" is to be ascertained with a view to determining the "increment duty" payable on an occasion.

In March, 1912, the "original site value" was ascertained in manner provided by s. 25 of the Finance (1909-10) Act, 1910. There were two houses of equal value, but for simplicity I shall refer to one house only. The original gross value was 800*l*. and the deductions to arrive at full site value were 610*l*., leaving the original assessable site value 190*l*. The correctness of these figures has not been disputed. On any subsequent occasion, prima facie, 190*l*. is the figure from which a start must be made under s. 2, sub-s. 2. But provision is made in s. 2, sub-s. 3, for enabling the owner who thinks that within a certain number of years the value was greater than in April, 1909, to apply for a

(1) [1913] 3 K. B. 809.

substituted site value for the purpose of increment value duty. It is not, however, a right to establish generally that the value was greater. It can only be exercised if one of two events has occurred, namely, (1.) a sale, or (2.) a mortgage. Application was made under that sub-section by reason of a mortgage in December, 1898, for 800*l.* The special case finds that the market value in December, 1898, was 1200*l.*, the mortgage for 800*l.* being for two-thirds of such value. The owners contended that 1200*l.* must be taken as the starting point, with the result that the substituted site value would be 273*l.* instead of 190*l.*, and Scrutton J. has accepted this contention. From this decision the Commissioners have appealed.

It is necessary to consider the language of s. 2, which, though apparently simple, seems to me to present serious difficulties. In the first place, this is not a "transfer on sale of the fee simple"—s. 2, sub-s. 2 (*a*)—within the meaning of the definition clause, s. 41. In the second place, it is a transfer of an "interest in land"—s. 2, sub-s. 2 (*b*). But as the house was let on a yearly tenancy at a rack rent, the value of the fee simple did not exceed the value of the interest, the subject of the mortgage. In truth the values were identical.

In the third place, in order to ascertain the original site value under s. 25, you must first discover the gross value. This is an imaginary figure and represents what in April, 1909, a willing seller might be expected to realize by means of a sale in the open market of the fee simple of the land in its then condition free from incumbrances and from any further charge or restriction. Having got this fictitious price, you are to make certain deductions which are described in s. 25, sub-s. 2, deductions which are not constant but which may, and in most cases must, vary from year to year.

In the fourth place, if you want to ascertain the substituted site value in December, 1898, directions are given in s. 2, sub-s. 3: "Site value shall be estimated for the purposes of this provision by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such a transfer after the passing of this Act."

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

This throws you back upon sub-s. 2 (*a*) or (*b*). In effect this treats the actual consideration given on a sale prior to April, 1909, as equivalent to the estimated gross value under s. 25. This is fairly intelligible. It will still be necessary for the purpose of the deductions to have regard to the condition of things at the date of the actual sale, which may—and generally must—be different from the state of things in April, 1909. The buildings may be more or less valuable, the timber may be of more or less value, and so on.

Then we come to the words which apply to the present case, s. 2, sub-s. 3: "This provision shall apply to a mortgage of the fee simple of the land or any interest in land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration." This is a complete departure from the idea of gross value in s. 25. There is nothing to indicate the proportion which the mortgage debt bears to the value of the land. It is not limited to mortgages to trustees. It is almost illusory as a benefit to the owner. Indeed I am not aware that it can have any effect unless the value of the property has so far diminished that the amount actually advanced in 1898 was greater than the gross value in April, 1909.

There is no pretence for ascertaining, however roughly, the gross value in 1898. It seems to me irrational and absurd, but the language is too strong. I am told to substitute the mortgage debt—whether it be 500*l.* or 1100*l.*—for the purchase-money. Scrutton J. thought he could treat the words as a direction to find the gross value in 1898 by reference to the amount advanced by the trustees, namely, 800*l.*, which was two-thirds of the full value, namely, 1200*l.* I regret that I am unable to adopt this view.

It follows that in my opinion the appeal must be allowed.

SWINFEN EADY L.J. This special case raises the question of the true construction of the Finance (1909-10) Act, 1910, s. 2, sub-s. 3.

The original site value of 62 and 64, Tisbury Road, Hove, has been fixed by the Commissioners at 190*l.* each. An application

was then made in due time to the Commissioners to substitute the site value on December 22, 1898, this being the date on which a mortgage of the two houses was executed to secure 1600*l.* The mortgagees were trustees lending part of their trust funds upon the security.

Sub-s. 3 provides that in the case of any transfer on sale, within the statutory period, of the fee simple of land, site value shall be estimated by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such a transfer, after the passing of the Act. The mode in which this site value is to be estimated was recently dealt with by this Court in *Lumsden* v. *Commissioners of Inland Revenue*. (1) But in the present case reliance is not placed on any transfer on sale within the statutory period, but on a mortgage for 1600*l.*, which has been treated as if it were 800*l.* on each house.

The next clause of sub-s. 3 provides that the provision shall apply to the mortgage of the fee simple of the land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration. In other words, for the purpose of arriving at substituted site value, you take the amount secured by the mortgage as if it were the consideration on sale, and deal with it on the same footing. The language of the section affords no means of escape from this result.

It was urged that the expression "site value shall be estimated . . . . by reference to the consideration" does not mean that you are to adopt the consideration as your starting point; but if site value is to be estimated in the same manner as on a transfer where increment value duty is to be collected, as the statute says it is to be, this lets in the provisions of sub-s. 2, by which the site value on the occasion is the value of the consideration for the transfer, less certain deductions.

It was urged on behalf of the respondent that the statute only requires site value to be estimated "by reference to the consideration" and that where the consideration is for a mortgage you

(1) [1913] 3 K. B. 809.

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

simply cannot estimate the value without taking into account the equity of redemption. The Solicitor-General contended that it could not have been intended to proceed on those lines, as that would involve arriving at what the value of the property was at some former period—say twenty years before—and what deductions ought to be made to arrive at the divested or site value at the same period. But all these consequences are involved, having regard to *Lumsden* v. *Commissioners of Inland Revenue* (1), even if you start with the consideration stated in the mortgage deed; according to that decision there will be a new gross value, and a new amount to be deducted to arrive at the full site value or divested value. Although you may not be able fairly to arrive at the real site value by starting with the mortgage consideration, yet the statute says this is what you are to do.

It was said there is not here any mortgage of the fee simple, as by s. 41 "fee simple" is defined to mean the fee simple in possession not subject to any lease, and there was at the date of the mortgage a tenant at rack rent in occupation, but in any case it was a mortgage of "an interest in land."

In my opinion the decision of Scrutton J. was erroneous and the special case should be answered by saying that the amount secured by the mortgage is to be substituted for the purposes of s. 2, sub-s. 3, for the consideration given on the transfer by reference to which consideration site value is to be estimated.

PHILLIMORE L.J. The Finance (1909-10) Act, 1910, provides for a valuation for purposes of duties on land values, which duties include the increment value duty and the undeveloped land duty. By s. 1 of the Act, on the occasions there mentioned, which include, among others, the passing of the property by transfer or upon death, an increment value duty is to be paid if increment there be. By s. 2, sub-s. 1, the increment value is to be the amount by which the site value on the occasion exceeds the original site value as ascertained by the valuation. By sub-s. 2, provisions are made for ascertaining the site value on the occasion. But the provisions for ascertaining

(1) [1913] 3 K. B. 809.

the original site value by valuation are not reached till we come to s. 25. However, quite out of place and inconveniently introduced, come, in sub-s. 3, substitutionary provisions which may supersede in certain cases the provisions for obtaining the original site value which are not reached till s. 25. The object of these substitutionary provisions is not far to seek. While, for undeveloped land duty, it will be the desire of the taxpayer to have the site value as low as possible, for ascertaining increment value duty it will be his desire to have it as high as possible.

A concession is therefore made (a purely facultative concession) to the taxpayer: if he wants to have the value high and can shew that within a reasonably recent period the higgling of the market has given what he contends to be the true value, he can have the valuation made, and as he thinks unsatisfactorily made, under s. 25, set aside, and he can have a substituted site value which will start from the consideration given for the land on its transfer on sale. It is only a starting point because the consideration given will have been given not for the land only, but for the land with its possible buildings, trees, and other superstructures, and so the consideration without deduction could not be a measure by which to value the future increment of the site only. Hence from the consideration must in some way be deduced, by making the appropriate deductions, the site value at the date of the transfer on sale. How this is to be done is neither easy nor certain, as the discussion before us has shewn. I do not think that it can be altogether necessary to use the ponderous process which we have been told is officially recommended to the Government valuers. But be that as it may, it has to be done somehow, or the taxpayer will not get the advantage which he desires and which the statute enables him at his option to take. This advantage is expressed in the section by saying that site value shall be estimated by reference to the consideration given on the transfer. It may happen that the transfer which is to form the starting point is not a transfer of the fee simple of the entirety of the land, but a transfer of some interest or some partial share in the land. In this case the first thing is to deduce from the consideration for this interest the corresponding

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

consideration for the fee simple. This is provided for by referring to sub-s. 2, which primarily supplies the mode of calculation for the beginning of the progression, that is, when the site value has to be estimated on an occasion; but has also to be used for the calculation at the other end. The calculations may be complicated, but the principle underlying them is quite simple. So much for cases when the consideration on a transfer for sale is taken as the starting point.

The next idea that seems to have occurred to the Legislature was this. The taxpayer may have had no transfer on sale sufficiently recent to be admitted as a starting point. But there may have been a mortgage, and though the sum advanced on mortgage will not give the value of the land, it will give a minimum limit; and as of recent years the value of the land has in many cases vastly diminished, it may suit a taxpayer to say: "I will not accept the Government valuer's valuation for site value, as that would bring out the land as worth even less than I obtained on its security." To enable the taxpayer to do this the next paragraph of the section has been enacted.

If there was always a fixed maximum of proportion of advance to value, such as three-fourths, two-thirds, or on leaseholds one-half, it might be possible to deduce arithmetically from the sum mortgaged a hypothetical consideration to be supposed to have been given on a transfer on sale. But there is no such fixed maximum, and though it might be safe to say that the land was worth more than the sum mortgaged, it would not be easy or sure to say how much more. To avoid minute and doubtful inquiries the Legislature has said that you may substitute the sum secured by mortgage for the consideration. Having so substituted this sum you then work out the site value by reference to it as you work out the site value by reference to the consideration.

The respondents contended, and Scrutton J. has held, that you go through an additional process for which there is no warrant in the statute; that you first infer or deduce from the sum advanced on mortgage a hypothetical full value or consideration given on a transfer on sale and then work out the site value by reference to this hypothetical consideration. In

my opinion this is a mistake, and the judgment under appeal, which is a decision upon this one point only, is wrong and should be reversed.

C. A. 1913

HAYLLAR v. INLAND REVENUE COMMISSIONERS.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Frank H. Hayllar.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1913 *Nov.* 12, 13.

INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED.

[1912 I. 1158.]

Ship—Bill of Lading—Exemptions from Liability—Fire caused by Unseaworthiness—Fire happening without actual Fault or Privity—Shipowner's Liability—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship is not liable to make good any loss or damage happening without his actual fault or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

The plaintiffs shipped on the defendants' vessel certain goods for carriage from Tréport to London on the terms of a bill of lading which stated that the goods were to be delivered subject to the exceptions and conditions therein mentioned. Among the exceptions were the following:—

(1.) "Fire on board, in hulk or craft, or on shore, stranding and all accidents, loss and damage whatsoever, from defects in hull, tackle, apparatus, ... perils of the seas . . . . or from any act, neglect or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants, or agents of the owners . . . . in the management, loading, stowing . . . . or otherwise . . . ."

(11.) "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners . . . . of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage."

The defendants also took on board at Tréport certain cases of metallic sodium saturated with petrol. The sodium was insufficiently packed and stowed with insufficient care. The vessel started in rough weather;

C. A.

1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

the cases broke loose, and coming into contact with water caused a series of explosions and fire on board, as the result of which the ship went down and the plaintiffs' goods were lost.

In an action to recover damages for the loss of the goods the judge at the trial found that the ship was not seaworthy at the commencement of the voyage; that the goods were lost by fire caused by the unseaworthiness without the actual fault or privity of the defendants within the meaning of s. 502 of the Merchant Shipping Act, 1894; but he held that the protection afforded by that section was excluded by the exceptions in the bill of lading, and that therefore the defendants were liable:—

Held, on appeal, that neither of the above exceptions in the bill of lading excluded the operation of s. 502 of the Merchant Shipping Act, 1894, and that therefore the defendants were entitled to rely upon the protection of that section, and were not liable for the loss.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229, distinguished.

Decision of Scrutton J. [1913] 1 K. B. 538, reversed.

APPEAL from the judgment of Scrutton J. at the trial of the action without a jury; reported [1913] 1 K. B. 538.

The plaintiffs claimed damages for the loss of certain cases of mineral waters shipped by them on the defendants' steamship *Hardy*, a British sea-going ship, at Tréport for carriage to London. The goods were shipped under a bill of lading, in the form of the London Direct Short Sea Traders' authorized form of continental steam bill of lading, which stated that they were shipped in apparent good order and condition and that they were "to be delivered subject to the exceptions and conditions herein mentioned in the like good order and condition." The exceptions and conditions (so far as material) were the following:—

"(1.) The act of God . . . . fire on board, in hulk or craft, or on shore, stranding and all accidents, loss and damage whatsoever, from defects in hull, tackle, apparatus, machinery, boilers, steam and steam navigation, or from perils of the seas, ports, harbours, canals and rivers, or from any act, neglect or default whatsoever, of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners and/or charterers, ashore or afloat, in the management, loading, stowing, discharging or navigation of the ship or other craft or otherwise, the owners and/or charterers being in no way liable for any consequences of the causes before mentioned . . . ."

"(11.) It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners and/or charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage."

The defendants also took on board the *Hardy* at Tréport twenty cases of metallic sodium in the following circumstances, as stated by Scrutton J. in his judgment. The owners of the sodium sent to John Harrison, Limited, who were managing the *Hardy* for her owners, an inquiry for a freight quotation, to which Mr. Lindley, a director of John Harrison, Limited, and of the defendant company, replied: "Replying to your favour of the 14th inst., we have pleasure in quoting under rates sodium. In iron drums, hermetically sealed, packed in strong wooden cases, on deck at owners' risk from Tréport," with certain quotations for one-ton and five-ton lots. Mr. Lindley did not know much about sodium, but turned up the English railway classification and inserted its requirements as to packing, to which he adhered after a further letter. About two tons of sodium, which was saturated with petrol, were accordingly forwarded to Tréport for shipment in twenty cases, roughly 36 inches by 20 inches by 16 inches. Each case contained 100 kilogrammes of sodium in a metal case one-fiftieth of an inch thick, surrounded by a wooden case. The cases were labelled in French "Beware of damp." They were stowed on board the *Hardy* on deck on a tarpaulin on the main hatch, in two rows of ten cases, each row fore and aft. The tarpaulin was turned over them, another tarpaulin put on the top, and the whole bundle lashed round and across with ropes fastened to ring bolts in the hatch. If sodium comes in contact with water a very fierce heat is developed and an explosion may occur, and in the case of sodium saturated with petrol the heat developed by the contact of sodium with water would vaporize the petrol which would supply another explosive mixture. The *Hardy* started on her voyage to England in the ordinary rough weather of the English Channel. In half an hour after leaving port a

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

heavy sea came on board and knocked some of the cases of sodium off the hatch. The salt water got at the sodium and a series of explosions followed. The hatch was broken in and the hold set on fire. The poop and sides of the ship were broken and strained and began to leak. Some sodium falling down the fiddleys caused a fire in the engine-room, and shortly afterwards a very heavy explosion in the hold broke the ship in two and she sank with her cargo. The plaintiffs' goods were in the burning hold, and it was doubtful whether they had been destroyed by fire or not when the ship went down through the incursion of sea water.

The defendants in their points of defence relied, first, upon s. 502 of the Merchant Shipping Act, 1894 (1), and, secondly, upon the exceptions in the bill of lading.

Scrutton J. found as a fact that the sodium was shipped in cases insufficiently strong for the voyage, and was stowed with insufficient care and security having regard to its dangerous character if water came in contact with it; that the ship's officers did not know of the dangerous character of sodium, and if they had they could have taken more precautions in stowage; that Lindley knew that there was some danger, though not its exact nature; that he did not know about the petrol; that the sodium was not shipped, as he stipulated, in "iron drums" as ordinarily understood in commerce; that he had nothing to do with the negligent stowage or the insufficiency of packages; and that proper drums properly secured could have been carried safely on deck. Upon these findings the learned judge held that the ship was unseaworthy at the commencement of the voyage owing to bad stowage endangering her safety; that the plaintiffs' goods were lost by reason of fire within the meaning of s. 502 of the Merchant Shipping Act, 1894, without the fault or privity of the defendants; but, following *Virginia Carolina Chemical Co.* v.

(1) 57 & 58 Vict. c. 60, s. 502: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

"(i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . .

Norfolk and North American Steam Shipping Co. (1), that the operation of s. 502 was excluded by the exceptions in the bill of lading. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Dawson Miller, K.C., and *F. D. Mackinnon*, for the defendants. The defendants do not question the finding of the learned judge that the ship was not seaworthy at the commencement of the voyage. They appeal against that part of the judgment in which the learned judge held that the operation of s. 502 of the Merchant Shipping Act, 1894, was excluded by the exceptions in the bill of lading. That part of the judgment is based upon the decision of the Court of Appeal in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) That case decided that a shipowner is not deprived of the protection of s. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship, but that in that particular case the effect of the exceptions in the bill of lading was to preclude the shipowner from setting up the section as an answer to a claim for the loss of the goods by reason of fire on board caused by the unseaworthiness of the ship. The implied warranty of seaworthiness is modified by s. 502 so far as regards loss caused by fire. There is accordingly no warranty of seaworthiness in the case of loss by fire on board happening without the actual fault or privity of the shipowner, unless it can be shewn that the shipowner has by the bill of lading expressly or by necessary implication excluded the protection of the section. The liability in such a case is prima facie taken away by s. 502, and it requires clear language to reintroduce the liability so taken away. The mere fact that the shipowner has protected himself in other cases does not shew an intention to revive the liability. For instance, s. 502 only deals with fire on board; clause 1 of the exceptions in the bill of lading covers fire on board, in hulk or craft, or on shore. The shipowners want further protection than that given by the section. The bill of lading in this case is different from that in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) In the exceptions in that case there was an

(1) [1912] 1 K. B. 229.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

exception of unseaworthiness provided all reasonable means were taken. As Buckley L.J. said (1), the latter part of the clause containing the exceptions, though negative in form, implied an affirmative, that the shipowners would be liable for unseaworthiness if they had not taken all reasonable means to provide against unseaworthiness. In the present bill of lading there is no such clause. The ordinary exceptions are in clause 1, and then there is clause 11. There is nothing in this latter clause from which a positive obligation as to seaworthiness in general can be implied. It only applies to the warranty of seaworthiness as to the upkeep of the ship, that is, the structure. The terms of that clause have been fulfilled as the ship's class has been kept up. That clause therefore does not affect the protection given to the shipowners by s. 502. If the clause is ambiguous in its meaning, it cannot be relied upon as depriving the shipowners of the protection of the section. Nothing can be found in the bill of lading which places the shipowners under a greater liability in case of loss by fire than that which the section imposes, namely, a liability for loss by fire caused by their actual fault or privity. There is no clause in the bill of lading in favour of the cargo owners which has the effect of restoring to them the right of which s. 502 has deprived them. Further, it is a question whether, apart from s. 502, the shipowners are not protected by the language of clause 1 dealing with stowage. The loss arose from negligent stowage, and the words of the clause protect the defendants. A negligent act of stowage may render a ship unseaworthy in the sense of being unfit for carrying goods. The judgment was therefore wrong. [*Wahlberg* v. *Young* (2) was also referred to.]

Leck, K.C., and *Raeburn*, for the plaintiffs. All the elements which were present in the exceptions in the bill of lading in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (3) are present in the bill of lading in this case. The exception of "fire on board" in clause 1 of the exceptions and conditions is, like all exceptions in the bill of lading, subject to the performance by the shipowner of the implied warranty of seaworthiness: *Steel* v. *State Line Steamship*

(1) [1912] 1 K. B. at p. 242. (2) (1876) 45 L. J. (Q.B.) 783.
(3) [1912] 1 K. B. 229.

Co. (1) According to the decision in the *Virginia Carolina Chemical Co.'s Case* (2) a shipowner is not deprived of the protection of s. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship. Therefore s. 502 is not subject to the implied warranty of seaworthiness. The exception of "fire on board" in the bill of lading in the present case is subject to the implied warranty of seaworthiness, and therefore the exception must read as if it were "fire on board not occasioned by unseaworthiness of the ship." That exception is inconsistent with the provisions of s. 502, which relieves the shipowner of liability even if the goods are lost by reason of fire caused by unseaworthiness without his actual fault or privity. The defendants have contracted to carry the cargo safely and to deliver it in good order and condition "subject to the exceptions and conditions" mentioned in the bill of lading, one of which is "fire on board." There is a contract to carry and deliver the goods subject to those exceptions. The exceptions in clause 1 are in favour of the shipowners provided that the loss by an excepted peril is not caused by the unseaworthiness of the ship. Inasmuch as the shipowners have expressly contracted for that liability, the contract must be taken impliedly to exclude another and different liability under s. 502. The bill of lading is the code to the exclusion of s. 502 on which the goods were carried. For instance, clause 2 of the exceptions (3) deals with the carriage of valuable articles, such as jewellery, and protects the shipowners if previous arrangements have not been made. That means that the shipowners will be liable if previous arrangements have been made. Sect. 502, sub-s. (ii.), of the Act also protects the shipowner in the case of valuable articles, but the protection there given is different from that given by clause 2

(1) (1877) 3 App. Cas. 72.

(2) [1912] 1 K. B. 229.

(3) Clause 2 provided that "the ship, her owners, charterers, or master are not liable (as regards pilferage, negligence, or otherwise) for any loss, breakage, damage or injury in respect of animals, coin, jewellery, pictures, statuary, china, earthenware, glass, looking glass or glass ware of any description, plate, baggage, private effects, and furniture, and similar articles of value unless previous arrangements in writing have been made . . . ."

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

of the exceptions in the bill of lading. Therefore clause 2 excludes the protection of sub-s. (ii.). There being the absolute warranty of seaworthiness applicable to clause 1, the parties have agreed that it shall be qualified or limited to the extent specified in clause 11, namely, as regards the structure of the ship. Clause 11 only extends to the upkeep of the ship, that is to say, to the warranty of seaworthiness so far as regards the structure of the ship. This is its natural meaning. If, however, there is an ambiguity about it, the defendants cannot rely upon it as protecting them even in that case: *Nelson Line (Liverpool)* v. *James Nelson & Sons.* (1) The defendants are therefore liable upon this ground. [*Master and Owners of S.S. City of Lincoln* v. *Smith* (2) was also referred to.]

If, however, the operation of s. 502 has not been excluded by the exceptions in this bill of lading, the loss did not happen without the actual fault or privity of the defendants, and the protection afforded by the section is taken away. The learned judge was wrong in his conclusion upon this point. The correspondence shews that Lindley, who was acting in the matter on behalf of the defendants, knew of the dangerous nature of metallic sodium, and he was in fault in not having taken further steps to see that the sodium was properly packed and in not giving special instructions as to its stowage. He was privy to the sodium being stowed on deck which was the cause of the accident: *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (3)

Further, the defendants have not proved that the loss here happened by reason of fire. The loss was caused by the sea coming in, that is, by an ordinary peril of the sea.

Dawson Miller, K.C., in reply. The loss happened by reason of fire: *The Diamond.* (4) The fire was the effective cause of the loss.

[VAUGHAN WILLIAMS L.J. We are all agreed that the loss was by reason of fire.]

As to the question of fault or privity, no such accident as this had ever happened before, and Lindley thought that the

(1) [1908] A. C. 16.
(2) [1904] A. C. 250.
(3) Ante, p. 419.
(4) [1906] P. 282.

sodium was packed in iron drums, and if so packed it could, according to the finding of the learned judge, have been carried safely on deck.

VAUGHAN WILLIAMS L.J. In my opinion this appeal succeeds. We have heard arguments with reference to the implied warranty of seaworthiness and as to its continuance notwithstanding s. 502 of the Merchant Shipping Act, 1894. In *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) this Court arrived at a decision as to the meaning of s. 502. That section provides that "the owner of a British sea-going ship . . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity . . . . where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." In the first place it seems to me to be clear upon the evidence that the fire in this case occurred without the actual fault or privity of the shipowners. There was no real evidence of any fault or privity on their part. A question might be raised upon the construction of the section as to the onus of proving that the loss occurred without the actual fault or privity of the owners. Having regard to the language in which the section is expressed I think that the onus is not upon the shipowner to prove the negative, namely, that he has not been guilty of actual fault or privity, but that the onus is on those who sue the shipowner to prove the affirmative, that is to say, to prove the actual fault or privity of the shipowner. I expressed this view in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (2) In the next place I am of opinion that the goods were "lost or damaged by reason of fire on board the ship" within the meaning of the section. I need not trouble myself with the question whether the cause is the last cause, or what step in the causation it is. It is sufficient if one can say truly and reasonably that the loss was a loss by reason of fire on board the ship.

The head-note in *Virginia Carolina Chemical Co.* v.

(1) [1912] 1 K. B. 229. (2) Ante, pp. 428, 429.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Vaughan Williams L.J.

Norfolk and North American Steam Shipping Co. (1) states that "a bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received thereunder for carriage occasioned by (inter alia) fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness. Held, by Bray J. and by the Court of Appeal, that a shipowner is not deprived of the protection of s. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship." We must act upon that as being the law laid down by this Court, and I do not think that counsel for the plaintiffs have in any way invited us to depart from it. The fact that the ship was unseaworthy is, according to that decision, not such a fact as excludes the protection given to the shipowner by s. 502. Therefore where there is a loss by reason of fire happening without the actual fault or privity of the shipowners, though the fire is caused by the unseaworthiness of the ship, there is a state of law and a state of facts under which, as far as I have gone, the shipowners are not liable to be sued. The head-note goes on: "but that the effect of a bill of lading containing the above clause is to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods, shipped under the bill of lading, by reason of fire on board the ship caused by the unseaworthiness of the ship." I have therefore to apply this state of the law. Prima facie the shipowners have the protection of s. 502. But I have to see whether or not the bill of lading in this case is such that the parties have substituted a new contract which excludes the operation of the section; in other words, whether there is an agreement between the parties that in the case of this particular voyage and these particular goods the operation of the section protecting the shipowners shall be excluded and that the liability shall depend upon the bill of lading alone. In my opinion there is no such contract excluding the protection afforded to the shipowners by s. 502 and substituting therefor the contractual liability of the bill of lading.

I propose now to refer to the judgment of Buckley L.J. in

(1) [1912] 1 K. B. 229.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* (1) After stating that the true construction of s. 502 was that it relieved the shipowner in the case of fire not only from his liability as an insurer, but also from his liability under an implied warranty of seaworthiness, the learned Lord Justice said that it was common ground that it was competent for the shipowner to contract himself out of the benefits conferred by the statute if he used apt words for that purpose in the bill of lading. In my opinion the contract must be clear to that effect. It is not sufficient to shew a contract which is reasonably capable of two interpretations. In order to exclude the statute, the Court must come to the conclusion that the interpretation which the cargo owners contend for is the true interpretation of the contract, and not merely a possible interpretation of it. The clause in the bill of lading relied upon in that case as excluding the protection given by the statute was this: "The shipowners and/or charterers are not responsible for any loss, detention of or damage to the goods, or the consequences thereof, or expenses occasioned by any of the following causes, viz. . . . . fire on board, in hulk, in craft, or on shore; explosions, heat, defects in hull, tackle, engines, boilers, machinery or their appurtenances, or accidents arising therefrom; perils of the seas . . . . and all accidents of navigation . . . . nor for any act, neglect or default of the pilot, master, crew, stevedores, engineers, or agents of the shipowners . . . . or by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever." Buckley L.J. then proceeds: "I read that clause as divided into two parts; the first part is the whole of the clause with the exception of the last line and a half; the second part is the last line and a half. That second part is addressed to unseaworthiness. It is in these words: 'shall not be responsible for damage to goods by unseaworthiness of the ship at the commencement of or at any period of the voyage provided all reasonable means have been taken to provide against such unseaworthiness.' It then concludes with the words 'or

(1) [1912] 1 K. B. at p. 240.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Vaughan Williams L.J.

by any other cause whatever.' By that portion of the clause it seems to me that the shipowner was contracting as to what was to be his liability under the head of implied warranty of seaworthiness, and his whole liability in respect of that is defined there. The earlier part of the clause is, in my opinion, to be read as if it said, 'As for unseaworthiness, I am going to deal with that presently. In this first part of the clause I am not going to deal with it at all. For the first part of this clause I am content to take it that my ship is to be a seaworthy ship.' I think that part of the clause expresses this: 'If my ship is seaworthy, my contract is that I shall not be liable for fire on board as insurer against fire, and that exemption from liability is to apply not only in the cases mentioned in s. 502 of the statute, but in any case whatsoever.' Having said that, he has finished with his liability as insurer. Then he proceeds to deal with his liability under the implied warranty of seaworthiness, and the next words, I think, define all his responsibility in respect of that. He says, 'I will not be liable for unseaworthiness provided all reasonable means have been taken to provide against such unseaworthiness.' These last words are negative words, but I think they are pregnant words, and infer an affirmative. In that clause he has in effect said, 'I will be liable for unseaworthiness if I have not taken all reasonable means to provide against unseaworthiness.'" Now, if the words in the present bill of lading had been to the same effect as the words which I have just been reading from the bill of lading in that case, the judgment of Scrutton J. would have been right. But when one looks at the bill of lading in the present case, one sees at once that the words are very different. The bill of lading states that the goods are to be delivered subject to the exceptions and conditions therein mentioned in the like good order and condition in which they were shipped; and then it sets forth a number of clauses containing exceptions and conditions. The first is ". . . . fire on board . . . . and all accidents, loss, and damage whatsoever . . . . from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners and/or charterers, ashore or afloat, in the management, loading, stowing, discharging or navigation of the ship or other

craft or otherwise, the owners and/or charterers being in no way liable for any consequences of the causes before mentioned." The only other clause which it is necessary to read is clause 11. "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners and/or charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage." The sole question which we have to determine is whether those clauses or either of them contain a contract between the parties excluding the benefit to the shipowners of the protection of s. 502. In my opinion there is nothing in the words which in any way constitutes such a contract. If the words are read carefully, it is plain to my mind that the parties, so far from having impliedly excluded the protection of s. 502, assumed that that protection would continue.

With regard to the judgment of Scrutton J., a difficulty has been suggested in that the learned judge in one part of his judgment treated clause 11 of the exceptions as too ambiguous safely to draw any inference from it, and in another part of his judgment he treated it as being the effective clause upon which the conclusion he arrived at was based. I think he merely meant that the clause was too ambiguous to derive from it a particular inference which he was asked to draw in favour of the defendants. I do not think he meant that the clause generally was too ambiguous to be construed. I do not propose to say more about that. Shortly my judgment is this, that prima facie there is included in the bill of lading the statutory protection of the shipowners under s. 502. If the protection is not expressly or impliedly excluded, it follows that one starts with the proposition that the conditions in this bill of lading are accompanied by the provision contained in s. 502 for the protection of the shipowners. I have therefore to see if I can find anything in the words of this bill of lading which excludes the operation of that protection. I can find nothing. The bill of lading in this case seems to me to be wholly different from that in the *Virginia Carolina Chemical*

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Vaughan Williams L.J.

Co.'s Case. (1) It is said, as I understand, that one ought to infer an exclusion of the operation of the section because it is provided in clause 1 of the exceptions in the bill of lading that "loss by fire" is not to be charged against the shipowners in certain cases; in other words, that that clause assumes that the protection is gone, and that the liability under the bill of lading is substituted for it. I do not think that contention is correct. It is always possible when dealing with the protection given by s. 502 that it may be proved that there is some actual fault or privity on the part of the shipowner, and in my view ample meaning is given to the words in this bill of lading if they are treated as intended to apply to a case where through actual fault or privity the shipowners have lost the benefit of the protection.

I have already expressed my view that there is no evidence whatever which would justify the conclusion that the fire was caused through the actual fault or privity of the shipowners. The suggestion is that upon the correspondence it ought to have occurred to them that the sodium was a cargo which required careful and proper packing and stowing, and that therefore they ought to have taken some special steps. I do not know what special steps they ought to have taken. In my opinion they were guilty of no fault in the matter. The appeal must therefore be allowed.

BUCKLEY L.J. The plaintiffs' goods were lost by reason of fire. This is not a matter which I intend to elaborate. It is not the point which has been argued before us. The learned judge has found that the goods were lost by reason of fire, and in my opinion he is right. I content myself with saying that. That being so, the first question is whether s. 502 of the Merchant Shipping Act, 1894, applies. A further question has been raised by counsel for the plaintiffs. They contend that, if they are wrong upon the first question, and if s. 502 does apply, still the decision of the learned judge is right because he wrongly came to the conclusion that the fire happened "without the actual fault or privity" of the shipowners. Those are the only

(1) [1912] 1 K. B. 229.

two questions which have to be decided. The first is by far the more important.

As between shipowner and shipper of cargo there existed apart from the statute two liabilities in the former towards the latter; the first, a liability as insurer arising from the fact that the shipowner was a carrier and under a duty to produce the goods which had been entrusted to him for carriage; the second, a liability arising from the implied warranty of seaworthiness. Sect. 502 of the Merchant Shipping Act, 1894, qualifies those liabilities. Its effect is that neither as insurer nor under the implied warranty of seaworthiness is there liability for loss by fire happening without the owner's actual fault or privity. This statutory qualification of the shipowner's liability is a statutory provision in favour of the shipowner and adverse to the cargo owner. It deprives the cargo owner of remedy in the particular case. The statute, however, can be excluded by express contract. The question here to be determined is whether the bill of lading is such as that by express contract there has been restored to the cargo owner that which otherwise the statute has taken away. I have therefore to look at the contract and see what stipulations there are relevant to this matter which are in favour of the cargo owner, and whether they have the effect of excluding the statute.

The contract is for carriage of the goods and delivery "subject to the exceptions and conditions herein mentioned." Those words in themselves tell me nothing. I must look at the exceptions and conditions which are introduced by reference. I have to see whether those exceptions and conditions include expressly or by implication a contract or condition that the statute shall not apply. The articles relied upon for this purpose are articles 1 and 11. The first sentence of article 1, which is the relevant part of the article, contains an exception of risks, that is to say, an exception in favour of the shipowner. There is nothing in it which is in favour of the cargo owner. I am not sure that I might not leave this article with that observation, because it is only stipulations in favour of the cargo owner which can assist the plaintiffs. But I will say this. Article 1 being as it is in favour of the shipowner might mean either one of two things. It might mean either that he

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Buckley L.J.

shall not be liable for loss by fire in any circumstances, or that he shall not be liable for loss by fire except in the case of unseaworthiness. If the former be the true meaning, the statute is not wanted and the plaintiffs fail, for contractually there is excluded loss by fire in whatever circumstances that loss may occur. If, as in my judgment is the right view, the latter be the true meaning, then the liability is such as arises in the case of unseaworthiness. The liability which arises in that case is the common law liability subject to the qualification introduced by s. 502 of the Act. Therefore the liability is only that which remains after s. 502 is applied.

The other article is article 11. It is relied upon by the plaintiffs as containing by implication some stipulation in favour of the cargo owners. As to the true construction of that article, I think that the plaintiffs are right. They contend that it is an article controlling the warranty of seaworthiness or dealing with the warranty of seaworthiness so far as relates to the upkeep of the ship and nothing more. I agree with that. It is an article dealing with liability in respect of any duty, warranty, or obligation arising from duty in respect of the upkeep of the ship. In the first place it seems to me that the article is wholly an affirmative and in no sense a negative article. It does not deal with any matter by way of exclusion. The frame of the article is such that the existing liability remains but is contractually incapable of being enforced if the conditions of the article have been complied with. I may express my meaning in this form. If an action were brought the defence arising upon that article would be, not that the defendant was not liable, but by way of confession and avoidance that he was liable, but that the plaintiff had contracted not to sue him. These observations are relevant in this sense: that if the article were an article of exclusion something might be implied from that as to what is included. If it is not an article of exclusion nothing arises therefrom. Further the article is silent as to any matters relating to unseaworthiness arising, not from the upkeep of the ship, if the construction which I adopt is the true one, but from other considerations such as those which arise in the present case. The implication which arises from the fact of silence as regards the unsea-

worthiness relevant in this case is not, I think, that there is any express stipulation with regard to that matter, but simply that passing it sub silentio all rights of the cargo owner in that respect are left unaffected. His rights in that respect are the rights which arise from the warranty of seaworthiness controlled, as it is, by the exception created by s. 502 of the Act. I cannot find in this any agreement to exclude the statute. I must read the contract as if the exception contained in the statute were written into it, unless I find that there is something in the contract which says that the provision of s. 502 shall not apply. I find that there is nothing said about it, from which, in my judgment, it results that the liability of the shipowner in this respect is unaffected, and the statute is left to take effect.

The decision of this Court in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) is in my opinion wholly different in this respect. The parties there had expressly contracted as regards unseaworthiness generally in that by the latter part of the article relating to exceptions they had contracted by negative words that there should be no liability for unseaworthiness provided all reasonable means had been taken to provide against such unseaworthiness. Words of exclusion necessarily infer that the subject from which an exception is made is included within the document which contains the exception. A contract can only exclude that which in the absence of exclusion would be included in it. From those negative words, therefore, it followed by implication that there was an affirmative contract that the shipowner should be liable for unseaworthiness if reasonable means had not been taken. That was an express contract as to unseaworthiness, and it dealt with every case of unseaworthiness. From this, in the judgment of this Court, it resulted that the particular case of unseaworthiness resulting in fire, which was excepted by s. 502, was dealt with by the general words dealing with unseaworthiness. In other words, there was a provision which shewed that that was the whole of the contract, to the exclusion therefore of that which the section had provided. In those circumstances it necessarily followed that the section was

(1) [1912] 1 K. B. 229.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Buckley L.J.

excluded. There are no such words in this case. Article 11, as I have pointed out, is not a clause of exclusion at all. It therefore raises no implication of inclusion. Moreover the plaintiffs can say no more than that unseaworthiness not connected with the upkeep of the ship is a matter which this contract leaves unmentioned. It results, I think, that it leaves it unaffected, that is to say, that there is no liability for it if it be such as the statute has excepted. From this it follows that upon this ground the defendants are right.

The plaintiffs, however, raise a further contention. They say that, assuming they are wrong in their contention that s. 502 is excluded by the contract, the conditions of that section are not satisfied, inasmuch as the fire did not occur without the actual fault or privity of the defendants. The learned judge has found that the fire occurred without the actual fault or privity of the defendants. The plaintiffs say that the learned judge was wrong upon this point, and that the result is that his order is right. That is a singular reason for supporting a learned judge's order. It is not the subject of a cross-appeal or of a notice of cross-contention. It is, however, no doubt open to the plaintiffs. The contention is rested upon some correspondence. I confess that I have failed to understand how actual fault or privity of the defendants is shewn thereby. What appears is that the shipowners contracted to ship the goods on deck at owners' risk with a packing of a defined kind, and that, as the plaintiffs say, the shipowners made for a different commodity much more stringent requirements as to packing than they made for this commodity. I fail to see how this shews either fault or privity. There is nothing to shew that for the commodity shipped they ought to have made the more stringent requirements, which they did require for the other commodity, or that they had any knowledge that the wooden cases in which the goods were packed contained metal cases of thickness insufficient to withstand the blow in case the goods were struck, as they were, by a sea. I see no ground for attacking the learned judge's findings in this respect.

Upon the first ground which I have stated it seems to me that the appeal succeeds, and that the judgment which the

plaintiffs have obtained for the value of their goods ought to be discharged and the action dismissed.

KENNEDY L.J. This case seems to me to be one of considerable importance. The question which we have to decide is whether or not Scrutton J. was right in holding upon the facts and documents in this case that the defendants were liable to the plaintiffs for the loss of their goods. The goods in question were either lost by sinking to the bottom of the sea from a ship whose sides were burnt or blown out, or actually destroyed by fire while still being carried on board the ship. I do not think that it can successfully be questioned, and it was only faintly questioned here, that the loss of the goods was correctly found by the learned judge to have been a loss by reason of fire on board the ship. At the same time it is important to bear in mind that it is essential for the party who is relying upon the provisions of s. 502 of the Merchant Shipping Act, 1894, not merely to shew that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to shew affirmatively that the loss happened without his actual fault or privity. That has been lucidly stated by Hamilton L.J. in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1), where he expressed the opinion that "the whole onus lies on the shipowner of proving as a defence loss by a fire of which he can predicate that it happened without his actual fault." As I am discussing the section I wish to say further that it is also important to bear in mind, upon the question of the shipowner being able to prove that the loss happened without his actual fault, that it is perfectly possible, as was pointed out by Hamilton L.J. in the next paragraph in the same case, that the shipowner might be liable although it was true to say the fire happened through the fault of a servant. In other words, the fault of the servant does not necessarily exclude the fault or privity of the shipowner. Taking this view of the section, in my opinion Scrutton J. was right in holding that there had been sufficient proof by the shipowners in this case that the loss happened without their actual fault or privity. The learned judge did not think that the matter was perfectly

(1) Ante, p. 436.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Kennedy L.J.

clear, and I think I understand the reason which he had in his mind. When the section says "without his actual fault or privity," the word fault may be taken as having the meaning stated by Bowen L.J. in *In re Young and Harston's Contract* (1) and as covering—and this seems to have been the view of all the Lords Justices in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (2)—either omission or commission; and, that being so, it might be alleged in this case against the shipowners that their representative, who was practically in the position of managing owner, knew from the correspondence that goods requiring particular care were being sent, and that he knew that the goods required particular packing, in fact he prescribed the packing himself — iron drums enclosed in strong wooden cases; and it has occurred to me, as I think it must probably have been in the learned judge's mind, that it is at any rate arguable that, with this knowledge, he would have acted wisely if he had sent to those on the ship, or to those whom he was employing to stow the ship, and told them to use special care in having the goods well stowed and well secured. Accepting, however, as I do, the finding of the learned judge to be correct when he says, "I think proper drums, properly secured, could have been carried safely on deck," then it is difficult to see how it can be said that the fire happened with Mr. Lindley's actual fault or privity, when he himself had given directions to the shippers, which he had a right to presume would be obeyed by them, that these goods should be secured in proper iron drums enclosed in strong wooden cases. I should draw on the whole the same inference as the learned judge drew, although he said he had some doubt as to his finding in the absence of special instructions to the stevedores dealing with this admittedly unusual cargo, requiring special care, that it should be stowed very firmly. The history of the calamity is this: the cases of sodium broke loose from their stowage, and the thin metal inside covering became exposed to the impact of the sea which ultimately produced the chemical results which caused the fire.

Assuming, therefore, that this is a case within s. 502 of the Merchant Shipping Act, 1894, in which the shipowners can

(1) (1885) 31 Ch. D. 168, at p. 174. (2) Ante, p. 419.

prima facie claim the protection of the section upon the ground that the cause of the loss has been a fire happening without their actual fault or privity, the position which results from that is this. According to the first branch of the decision of this Court in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1), it is no answer for the goods owner to say that, though the goods were lost by fire without the shipowners' actual fault or privity, they were lost by a fire which resulted from the unseaworthiness of the ship, that is to say, in the large sense in which that word is used as including unfitness to carry the cargo, which may, however, not affect the safety of the ship. We held in that case, while recognizing the difficulty of the question, that it was wrong to read s. 502 as qualified by the introduction therein of the implied warranty of seaworthiness, for to do so would require the Court to read the words "a British sea-going ship" as meaning "a British sea-going seaworthy ship"; and we accordingly held, for the reasons which we then gave and which I still think are correct, that even if the ship was in fact unseaworthy, and even if the fire arose from the unseaworthiness, the section protected the shipowners from liability.

That being so, the shipowners would in this case, if there were nothing more, be protected. It is said, however, that by the form of contract in this case the shipowners have excluded themselves from the benefit of the protection given by the section. The question therefore is whether the second branch of the decision of this Court in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) applies—in other words, whether under the special contract between the shipowners and the shippers contained in the bill of lading the former have excluded themselves from relying upon s. 502 of the Act. I may be wrong in thinking that a difficulty arises in following the reasoning of the learned judge in dealing with this point, but I confess I have a difficulty in seeing how clause 11 of the bill of lading can be treated as being too ambiguous to have the meaning assigned to it which the defendants require—as being "ambiguous both to lawyers and to business men" alike,

(1) [1912] 1 K. B. 229.

C. A. 1913

INGRAM & ROYLE, LIMITED v. SERVICES MARITIMES DU TRÉPORT, LIMITED.

Kennedy L.J.

so that the learned judge could not safely put an interpretation upon it—and yet be, as apparently it was, relied upon as bearing an interpretation which would justify the contention that there is found in this clause of the bill of lading something analogous to the latter part of the exemption clause of the bill of lading in the *Virginia Carolina Chemical Co.'s Case* (1) which we held in that case to exclude the operation of the section. Coming to the bill of lading in the present case, the first exception in clause 1 of the exceptions, "fire on board," is perfectly general. It is not fire on board caused by default of the shipowners' servants or agents; it is fire whether caused by the shipowners or their servants. The clause runs: "Fire on board, in hulk or craft, or on shore, stranding, and all accidents," and so on, enumerating a number of other possible misfortunes to the ship, and then it specifies "or from any act, neglect, or default whatsoever, of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners and/or charterers" &c. Prima facie, therefore, if that stood alone without anything being implied in it, it is a contract which would free the shipowners from liability for loss caused by fire however occasioned. There is no doubt that, if the statute is left out of consideration, there has to be implied in those exceptions a term that if the loss or damage is caused by any one of the matters so specially excepted owing to the ship being unseaworthy—which includes unfitness to carry the goods—the shipowners shall be liable. But in the one case of fire (as distinguished from all the other exceptions) caused without the actual fault or privity of the shipowners, even though the ship be unseaworthy, the statute has said that the shipowners shall not be liable. Unless, therefore, I can find something, as in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1), from which it is to be implied that the shipowners have excluded the statutory protection in case of fire, the plaintiffs are wrong. I certainly cannot find it in clause 1, which purports to confer a freedom from liability in all cases of loss or damage by fire. It is next sought in clause 11 of the exceptions, which, as I have said, occasioned me some little difficulty in following the

(1) [1912] 1 K. B. 229.

reasoning upon this point of the learned judge in the Court below.

Clause 11, if it is not so ambiguous that neither the lawyer nor the business man could be sure as to its meaning, is, as Buckley L.J. has pointed out, a clause which relates solely to the upkeep of the ship. It is merely a clause which affirmatively says that if the vessel is kept in her class, as she has been, or if failing a class there has been reasonable care and diligence in connection with the upkeep of the ship, it shall be considered a fulfilment of every duty, warranty, or obligation. If it has any meaning at all, it can only refer to the upkeep of the ship as a ship. That is irrelevant in this case. There is no question as to her upkeep as a ship. The question is as to her fitness to carry the cargo by reason of there having been stowed on board, at the time when she commenced her voyage, something which made her an unsafe vessel for the voyage, in regard both to herself as a ship and to the cargo which she carried. It therefore comes to this, that whether the clause is intelligible or not, I cannot infer from it that which the Court inferred from the latter part of the clause containing the exceptions in the bill of lading in the *Virginia Carolina Chemical Co.'s Case* (1), namely, a contract excluding the operation of the section and the protection given by it to the shipowners. I can find nothing of that kind in clause 11, and in clause 1 I find the assertion of a protection even larger than that given by the Act. Though, no doubt, a warranty of seaworthiness is a general implication, the true construction of this bill of lading is, as it seems to me, that it leaves the shipowners, in the case of a loss of goods by fire, entitled to the protection given to them by s. 502. I can find nothing in this bill of lading denoting an agreement on their part to abandon the statutory protection.

Appeal allowed.

Solicitors for plaintiffs: *Ballantyne, Clifford & Co.*
Solicitors for defendants: *William A. Crump & Son.*

(1) [1912] 1 K. B. 229.

W. F. B.

C. A.
1913
Dec. 8.

[IN THE COURT OF APPEAL.]

POSTMASTER-GENERAL *v.* HENDON URBAN DISTRICT COUNCIL.

Telegraph—Placing Posts and Wires in or across Street or Public Road—Consent of Body "having the control of such street or public road"—Highway not repairable by Inhabitants at large—Telegraph Act, 1863 (26 *&* 27 *Vict. c.* 112), *s.* 12.

By s. 12 of the Telegraph Act, 1863, "the company" (now the Postmaster-General) "shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road."

The Postmaster-General, being desirous of placing telegraph posts and wires in, along, and across a street or public road in an urban district, being a public highway not repairable by the inhabitants at large, required the urban district council to give their consent thereto under s. 12 of the Telegraph Act, 1863. It was admitted that the highway was a "street" which the urban district council could require the frontagers to make good under s. 150 of the Public Health Act, 1875:—

Held (affirming the decision of the Railway and Canal Commissioners [1913] 3 K. B. 451), that the urban district council, not being liable to repair the road, were not the body "having the control of" it within the meaning of s. 12; and that streets which have not been taken over by the local authority remain under the control of the owners of the soil over which they are made.

Appeal from a decision of the Railway and Canal Commission. (1)

On July 15, 1912, the applicant, the Postmaster-General, served notice on the defendants, the Hendon Urban District Council, under s. 12 of the Telegraph Act, 1863 (2), requiring

(1) [1913] 3 K. B. 451.

(2) The Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3: "In this Act the term 'street' means a public way situate within a city, town, or village, or between lands continuously built upon on either side, and repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenuræ, including the footpaths of such way, and any bridge forming part thereof; the term 'public road' means a public highway for carriages being repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenuræ, and not being a street, including the footpaths of such public highway, and

them, as the body having the control of the streets or public roads hereinafter mentioned, to give their consent to the placing of telegraphic lines (consisting of posts and the wires and apparatus connected therewith) in, upon, over, along, or across Vivian Avenue, Sylvan Avenue, and Hamilton Road, in the Hendon urban district. The defendants failed within twenty-one days after the receipt of the notice to give such consent, and thereupon a difference arose between the applicant and the defendants within s. 3 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), which was referred under s. 4 of that Act to the county court judge.

The roads in question were not repairable by the inhabitants at large, and it was contended by the defendants before the county court judge (1.) that the roads were not public highways,

any bridge forming part thereof, and also any land by the side and forming part of such a public highway, but not including a railway or canal."

Sect. 12: "The company shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road . . . ."

Sect. 13: "Where any landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company shall not place any work under, in, upon, over, along, or across such street or public road, except with the consent of such landowner or other person, in addition to the consent of the body having the control of such street or public road, where under this Act such last-mentioned consent is required . . . ."

By s. 2 of the Telegraph Act, 1868 (31 & 32 Vict. c. 110) (which empowered the Postmaster-General to acquire the undertakings of the telegraph companies), the term "the company" in the Telegraph Act, 1863, includes the Postmaster-General.

The Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 3: "The provisions of the Telegraph Acts, 1863 and 1878, relating to streets, public roads, lands, and buildings within the limits of any city or municipal borough, or town corporate, or any town having a population of thirty thousand inhabitants or upwards, shall, as amended by this Act, extend to streets, public roads, lands and buildings within the limits of any urban sanitary district; and for the purposes of those Acts the terms public road and street shall respectively include a public highway for carriages and a public way, although not repairable in manner in the Telegraph Act, 1863, mentioned, and the term 'public road' shall include a public highway for horses and a private road which is also a public footpath, if such highway or road is enclosed between hedges, walls, or other fences."

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

and were therefore not "streets or public roads" within s. 12 of the Telegraph Act, 1863; and (2.) that, even if the roads were public highways, as the defendants were not liable to repair them, they were not the body "having the control of" them within the meaning of the section. The county court judge upheld both these contentions, and made his award in favour of the defendants, declining to give his consent.

The Postmaster-General being dissatisfied with the award of the county court judge made an application to the Railway and Canal Commission under s. 4 of the Telegraph Act, 1878, to hear and determine the difference and to give their consent to the placing of the telegraphic lines in the said roads.

At the hearing before the Railway and Canal Commission it was admitted on behalf of the defendants that the roads in question were public highways, and were therefore "streets or public roads" within s. 12 of the Telegraph Act, 1863; that they were "streets" to which the defendants could apply the provisions of s. 150 of the Public Health Act, 1875, and that as regards Hamilton Road a notice had been served under that section requiring the frontagers to make good the road; and the only point raised was whether the defendants were the body "having the control" of the roads within the meaning of s. 12 of the Telegraph Act, 1863, so as to be able to give consent to the placing of the telegraphic lines in the said roads.

The Commissioners held that the urban district council, not being liable to repair the road, were not the body "having the control of" it within the meaning of s. 12. (1)

The Postmaster-General appealed.

Sir J. Simon, A.-G., Sir S. O. Buckmaster, S.-G., and *G. A. H. Branson*, for the appellant. By s. 12 of the Telegraph Act, 1863, "the company" are not to place a telegraph along a public road without the "consent of the body having the control of" the road. The terms "company," "telegraph," "street," and "public road" are defined by s. 3. By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 2, the term "the company" in the Telegraph Act, 1863, is also to mean the Postmaster-General.

(1) [1913] 3 K. B. 451.

The case for the Postmaster-General is that the Hendon Urban District Council is the body "having the control of" these roads within s. 12 of the Act of 1863 and therefore authorized to give the necessary consent. The respondents maintain that because these streets are not repairable by the inhabitants at large, they, although they are the highway authority for the district, are not the body empowered to give consent. By s. 144 of the Public Health Act, 1875, the urban sanitary authority were constituted the surveyor of highways within their district with all the powers, duties, and liabilities of the surveyor; and by s. 21 of the Local Government Act, 1894, urban sanitary authorities were called urban district councils. The respondents, therefore, now exercise within their district the office of the old surveyor of highways. Every public road within an urban district is under the control of the urban district council, whether it is repairable by the council or not. It is clear from s. 13 of the Act of 1863 that the body having the control of the road need not be the body liable to repair it, because it provides that where a landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public) the consent of that landowner or other person is required "in addition to the consent of the body having the control of such street or public road." Liability to repair therefore cannot be the test of control. It is admitted that the streets or roads in question are public highways, and it is the respondents' duty to protect the rights of the public over those streets or roads. By s. 2 of the Telegraph Act, 1878, "the expressions 'street' and 'public road' shall respectively include any highway." It cannot be intended that a private owner should be the person to give the consent. There is generally a question between the use of poles and buried cables, and the local authority ought to be the body authorized to give consent. A private owner might wreck the whole scheme. By s. 3 of the Telegraph Act, 1892, every highway is brought within s. 12 of the Act of 1863, whether repaired at the public expense within s. 3 or not. There may be streets for the non-repair of which nobody can be indicted although some one is liable by contract to repair them. That state of things is referred to in s. 13 of the Act of 1863. The

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

streets in question in this case have been dedicated to the public but not taken over by the local authority. Sect. 3 of the Act of 1892 cannot mean that there is no restriction until the street has been taken over. It shews that a highway is none the less a street because it is not repairable at the public expense. Telegraph lines may be placed in any street under s. 6 of that Act and the landowner cannot prevent it. A street now means any way over which there is a public right of passage. By s. 9 "road authority" means the body which would have control of a street if it were repairable at the public expense, but that provision only applies to the Act of 1892. *Redhill Gas Co.* v. *Reigate Rural District Council* (1), which was followed by the Railway Commissioners, was wrongly decided; moreover it was decided under another Act of Parliament and with reference to a rural district council. If the Legislature had meant that control was equivalent to liability to repair they would have said so. Sect. 2 of the Barbed Wire Act, 1893, and s. 6 of the Highways Act, 1835, shew that the words are used in a wide sense. By s. 69 of the Public Health Act, 1848, the local board of health had power to compel paving, &c., of private streets, and that power was probably referred to in s. 12 of the Telegraph Act, 1863. Sect. 150 of the Public Health Act, 1875, gives a similar power and shews that control may exist without liability to repair. Sect. 48 of the Towns Improvement Clauses Act, 1847, s. 38 of the Public Health Act, 1858, s. 34 of the Highway Act, 1862, and s. 6 of the Private Street Works Act, 1892, are to the same effect. It is admitted that the powers of surveyors are now exercised by urban district councils. The owner of the soil is not the body having control, for he parted with it when he dedicated the street to the public. The true view is that the urban district council have the control of all public roads, whether repairable by the inhabitants at large or not, within their district.

J. A. Foote, K.C., and *Rayner Goddard*, for the respondents. It is for the Crown to shew that we are the urban district council having the control of these streets, and they cannot do so. In 1835 if anybody dedicated a way to the public, and the public accepted and

(1) [1911] 2 K. B. 565.

used it, the duty was imposed on the public of keeping it in repair. The Highways Act of 1835 was intended to deal with that state of things. By s. 23 no road was to become repairable by the public till certain things had been done. The distinction between roads that were and roads that were not repairable at the public expense was recognized in ss. 24, 67, 68, 69, and 73. By s. 68 of the Public Health Act, 1848, the management of streets was vested in and under the control of local boards. That section was unnecessary, as by s. 2 the word "street" included any highway, and by the Public Health Act, 1852, s. 13, it was provided that "highway" in s. 68 of the Act of 1848 was to mean any highway repairable by the inhabitants at large. From that date till 1863 there were two classes of highways, those that were repairable at the public expense and those that were not; and that distinction was recognized in s. 3 of the Telegraph Act of that year. It is impossible to say that after 1852 any roads were under the control of local boards which were not repairable by the inhabitants at large. Sect. 149 of the Public Health Act, 1875, strengthens this view and continues the distinction, for it provides that all streets being highways repairable by the inhabitants at large in any urban district shall vest in and "be under the control of" the urban authority. There would be no object in that enactment if the highways were already under the control of the urban authority. Sect. 150 of the Act of 1875 confers no control over the road upon the urban council within the meaning of s. 12 of the Act of 1863. It only confers a power to make a road serve its purpose as a public highway by being kept in proper condition. Surveyors never repaired roads which had not been accepted by the local authority. By s. 152 of the Act of 1875, re-enacted by s. 41 of the Public Health Act, 1890, and by s. 19 of the Private Street Works Act, 1892, streets may be declared to be repairable by the inhabitants at large. The decision in *Redhill Gas Co.* v. *Reigate Rural District Council* (1) was correct and the respondents rely upon it. The Act of 1863 recognizes the distinction, for s. 3 defines "street" and "public road" as being a public highway repaired at the public expense, or at the expense of any turnpike or other public trust,

(1) [1911] 2 K. B. 565.

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

or ratione tenuræ. Sect. 13 refers to a landowner liable to repair ratione tenuræ or to a body such as turnpike or other public trustees who may be compelled to pay for the repairs. If a highway repairable ratione tenuræ is altered under statutory powers the liability to repair ratione tenuræ ceases. The Turnpike Acts created a fresh liability in certain persons, but as regards the public preserved the liability as it was before: *Reg.* v. *Barker* (1); s. 62 of the Highways Act, 1835. Expenses of repairing a highway may be recovered from a person who is liable to repair it ratione tenuræ: Highways Act, 1862, s. 34. An individual who dedicates a road remains liable for the repair of it. Sect. 9 of the Telegraph Act, 1892, shews that the body having the duty to repair is the body having the control of the street, because it enacts that "the expression 'road authority' means the body having the control of a street or public road, and where a street or public road is not repairable at the public expense, means the body which would have control of such street or road if it were repairable at the public expense." That shews that at any rate prima facie the body liable to repair is the body having control.

Sir J. Simon, *A.-G.*, in reply, referred to *Bussey* v. *Storey*. (2)

COZENS-HARDY M.R. This is an appeal from the Railway Commissioners, and it raises a point which is said to be, and I have no doubt is, of general importance as to the right of the Postmaster-General to exercise certain powers which are given by statute over highways which have not been adopted or taken over by the public authorities.

The question arises in this way. The Hendon Urban District Council has, within the limits of its area, three streets which have been to some extent metalled and made up, but have not been taken over or adopted by the authority, and are not now in any way repairable by the inhabitants or by the district council, or, so far as appears, repairable by any persons at all; they are simply spaces over which the public have a right of passing and repassing if they care to do so. The Railway Commissioners have held that, under the language of the sections I am about to

(1) (1890) 25 Q. B. D. 213, 219. (2) (1832) 4 B. & Ad. 98.

read, the district council are not the authority whose consent is necessary to the action of the Postmaster-General.

Now, as so often happens in these statutes, we have to find our way as best we can through what we can only describe as a maze. To begin with the Act of 1863. It is an Act which was passed at a time when telegraphs, a term which also includes telegraph wires, did not belong to the State and when the idea of the State taking over these things did not exist, and it dealt only in its terms with companies. There is a definition of "companies" which is quite clear: "The term 'the company' means any company to be hereafter authorised as aforesaid (hereinafter distinguished by the term 'future company') or any company already so authorised." Then the term "telegraph" is defined. Then the term "street" is defined as meaning "a public way situate within a city, town or village, or between lands continuously built upon on either side, and repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenuræ, including the footpaths of such way, and any bridge forming part thereof." Then "public road" is precisely analogous to "street."

Now, it is quite clear that under that statute the streets in question would not fall within the meaning or the operation of the Act, because it could not be said of these that they are repaired at the public expense or at the expense of any turnpike or public trust, or ratione tenuræ. Then the company is given, by s. 6, wide powers to place and maintain telegraphs under any street or public road, and may alter or remove the same. That, again, means a street or public road within the definition in the Act, and would not include these streets. Then we come to s. 12, which is a negative section: "The company shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road." Pausing for the moment, there is an odd definition of "body." A body includes person. It is generally the other way, that a person includes a corporation or public body, but "body" in this Act includes "person." Then there is a special exception in favour of what I may call private owners. Then comes s. 13, which has

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

Cozens-Hardy M.R.

been relied upon to an extent which I have some difficulty in following: "Where any landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company shall not place any work under, in, upon, over, along, or across such street or public road, except with the consent of such landowner or other person, in addition to the consent of the body having the control of such street or public road, where under this Act such last-mentioned consent is required." It is said that that shews that the words "having the control of the road" are not satisfied completely and are not identical with the term "being liable to repair." I agree in that, I think it has that effect, but s. 13 seems to me to apply to what was a perfectly well known and extremely common case, a turnpike trust which undoubtedly has the control of the road as long as the trust continues, and has powers and duties for keeping it up, keeping it in repair, and improving it, in consideration of which they receive certain tolls. The existence of such turnpike trusts, with all that is involved in the control of the road, did not exempt the person having a liability to repair ratione tenuræ from his liability to repair, although the turnpike trustees could not by completely changing the character of the road impose a liability upon the owner, whose liability was said to be ratione tenuræ, to repair a road of an entirely different character and far more expensive than he contemplated. I, therefore, do not think that we can put any construction on s. 12 by reference to s. 13 which would avail or in any way assist the Postmaster-General.

The second Act, which I need not refer to,—the Act by which the Government took over the telegraphs—made the word "company" in the earlier Act include the Postmaster-General. Nothing happened under which the Postmaster-General would have any right whatever even to touch these roads or to interfere with them in any sort of way till 1892, and in the Act of 1892 there is a section, s. 3, which is a very curiously drafted section. It says that, for the purposes of the Telegraph Act, the terms "public road" and "street" shall respectively include a public highway for carriages and a public way, though not repairable in manner in the Telegraph Act of 1863 mentioned. That is

to say, it would include a public road, although not repairable by the public. There is nothing whatever in that section to strike out the necessity for the consent of a body having the control of such a road, nor have I any difficulty, speaking for myself, with great respect for the very clear and admirable arguments we have heard, in seeing that perfectly good sense can be given to it. Who is the person who has the control of a road, though dedicated to the public, not adopted by them, and as to which it cannot be said that it is vested in anybody else? It seems to me it is the owner of the soil. The owner of the soil is the person who, as long as he does not interfere with the right of passage over the same, may, if he thinks right, repair it, macadamize it, make it a good or a bad road, and, in fact, may have what is really meant by these words "control of the road." We have, therefore, really to consider, and I think it is all we have to consider, whether, under the language of the Act of 1863, read with the Act of 1892, it can be said that the urban district authority have the control of these roads. We have heard an elaborate argument that they have, because, by a long and complicated devolution of title, certain powers were given by the Act of 1835 and the subsequent Acts of 1848, 1867, and 1875 to surveyors which, by various devolutions, to which I need not refer, are now vested in the urban district council; amongst others, the surveyors have certain rights which they may, if they think fit, under special circumstances exercise over highways not repairable by the public. I do not myself feel satisfied that any one of the sections that have been referred to applies to highways not repairable by the public: I do not think any of them do, but, however that may be, I cannot bring myself to doubt that, even assuming in certain circumstances and under certain conditions the surveyors could require certain things to be done over this road, that is not having the control over the street within the meaning of the sections of the Act. I do not think it is necessary to go through in detail the various sections which have been referred to. I respectfully agree with the decision of the Railway Commissioners and the learned judge, Bankes J., who gave the leading judgment; it seems to me it is a judgment which is quite right, and one which we ought not to

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

interfere with. In my opinion the appeal fails and must be dismissed.

SWINFEN EADY L.J. I am of the same opinion. The question turns upon the construction of s. 12 of the Telegraph Act of 1863, whereby "the company"—now the Postmaster-General—"shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road." The question is whether the Hendon Urban District Council is, as regards the three roads in question, or any of them, the body having the control of the streets or roads. Previous to the passing of this statute of 1863, the phrase "the control of the road" was a phrase well known to the Legislature, and used in Acts of Parliament, including the Public Health Act, 1848. By the Act of 1848 local boards of health were constituted; and by s. 68 (as interpreted by s. 13 of the First Public Health Supplemental Act, 1852) all the present and future streets, being highways repairable by the inhabitants at large, were to vest in and be under the management and control of the local board of health. Those were vested in and placed under the management and control of the local board; streets not so repairable were not; but there was a provision in the statute by which they might become so. Sect. 69 of the Act of 1848 gave power to compel the paving and making up, putting it shortly, of new streets, and then those streets might be adopted by the local board and become highways, and be from time to time repaired by them out of the rates levied under the authority of the Act; and then, when they became highways repairable in that manner, they were brought within s. 68, and were vested in and became under the management and control of the local authority. So that there is a distinction drawn, which is maintained in the subsequent statutes, between streets which are under the control of the local authority and streets which are not. The Act of 1848 has been repealed, but it has been re-enacted and extended by the Public Health Act of 1875, and the same distinction between the two classes of streets is preserved in that Act. By s. 149 of the Public Health

Act of 1875 streets repairable by the inhabitants at large vest in and are under the control of the urban authority. Then, by the subsequent sections, 150 and 152, other streets may be taken over; the local board may, if they think fit, take over other streets and repair them as highways, and thereupon the same shall become highways repairable by the inhabitants at large. Then under s. 149 they come under the control of the urban authority. So that there was a clear statutory provision for bringing streets under the control of the local authority, and distinguishing between streets which were and streets which were not under that control.

Now with regard to the three streets in question, there is not one which has yet become vested in or under the control of the local authority. All that can be urged in support of the view of the appellant in substance is, that the local authority are successors to and in the position of the old surveyors of highways, and they have such power as a surveyor of highways had. In my opinion, these new streets have never ceased to be, and still remain, under the control of the persons whose land was taken to form the streets. All that these persons have done is to dedicate the streets to the public; they have thrown them open to the public and allowed the public to have free access over them; they have become highways, but at present there is no liability upon the public to repair them, and they have not, nor has any one of them, come under the control of the local authority. For these reasons I am of opinion that the appeal fails.

PHILLIMORE L.J. I am of the same opinion. Much of the ground that I should have travelled over has been already better expressed for me in the judgments of the Master of the Rolls and Swinfen Eady L.J., and therefore I have very little to add.

This was an application under s. 12 of the Telegraph Act of 1863 to the urban district council for their consent to the Postmaster-General placing certain telegraphs or telegraph posts and wires over a particular portion of the ground, and what we have to consider is whether they are the body which, under the statute, have the power of giving consent or can

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

Phillimore L.J.

be asked to give consent. Now under that statute no compulsory placing of telegraphs, by which I mean the poles and wires, was contemplated except in streets or roads repaired at the public expense and at the expense of any turnpike or other public trust or ratione tenuræ, and that being the case it was quite easy to understand s. 12. The company were not to place the telegraph over a public street or public road except with the consent of the body having the control of such public street or public road. The body having the control of such street or public road would be in the ordinary case the representatives of the inhabitants at large. This being the year after the formation of the highway boards, there would in some cases be the highway boards, and in the other case the surveyor of highways representing his parish, or there might be turnpike trustees or similar bodies, like some of the bridge trustees, and there might possibly be individuals who had to repair part of the road ratione tenuræ, and who might be considered to have the control by reason of their having to repair. There would be no difficulty in determining who the body was. The only argument to suggest that there is any difficulty about it is drawn from s. 13, by which it appears that there may be two bodies to be consulted; there may be a landowner or other person liable for the repair of the street or public road, and in that case the company are not to place their telegraphs without his consent, as well apparently as the consent of the body having the control of such street or public road. Mr. Foote has pointed out at least one instance, and not an uncommon one, to which that would be applicable, cases where turnpike trustees have the control of the road and prima facie repair it, but where nevertheless there is a further liability upon some individual or individuals or body ratione tenuræ. In that case the consent of both bodies is to be obtained. It might be also that under the Act of 1862, s. 34, which was quite recent, the power of the highway board to repair roads repairable ratione tenuræ, and then to charge the expenses over upon the individual, might be said to give the board control or partial control, or such control as was meant by s. 12; and, therefore, it might be that their consent would be wanted under s. 12, and the individual's consent under s. 13. However, the

other case is quite sufficient to answer that. Then the Postmaster-General having been substituted for the telegraph company, we have to construe s. 3 of the Act of 1892. Now s. 3 of the Act of 1892 very greatly enlarges the power of the Postmaster-General. Under the second half of that section he is to have his right, subject to asking consent, and, if consent is refused, upon such terms as shall be fixed by arbitration, to put his telegraphs in other public highways. It is not necessary here to decide whether they are all other public highways or whether they include all such highways as simple footpaths, but he has at any rate a right to put his telegraphs in a great number of highways which have been dedicated to the public, and which are not repairable either by the inhabitants at large or by turnpike trustees or ratione tenuræ; and these particular pieces of land which this case refers to are such highways; they are laid out as streets for carriages, horses, and foot passengers, and they have been dedicated to the public; but they have not been taken over by the urban district council. Now he, having got that power, has not got any extension of the provisions as to the consents which he has to get. Fortunately for him, he is not necessarily in a difficulty, because the word "body" in s. 12 has been defined to include persons, possibly because the Legislature at the time was thinking of individuals liable ratione tenuræ, and therefore, if the word "persons" there is read as "body," he has only to get the consent of the persons having control of those highways which have not been adopted. It is said that means not the landowner, not the owner of the soil along these streets, because it may be very uncertain who he is and inconvenient to find him, but it means those who have the power to repair the highways, because they have the control of them. One answer to this is that it apparently flies in the face of the various provisions of the Public Health Act, which have been referred to by Swinfen Eady L.J., under which the vesting in the highway authority and the passing of control to the highway authority follow upon the highway authority taking the road over, and ex hypothesi did not exist before. The other answer is that in no sense can a highway authority be said to have the control of that highway which they have not adopted and taken over. It is suggested

C. A. 1913

POSTMASTER-GENERAL v. HENDON URBAN COUNCIL.

Phillimore L.J.

that under the Highways Act of 1835 many powers are given to the surveyor of highways which he is intended to exercise as well over highways not repairable by the inhabitants at large as over highways repairable by the inhabitants at large. I remember that when district councils were first formed there were various surveyors who thought that they had such powers and began to exercise such powers with regard, for instance, to footpaths in rural districts. I have always understood that they were promptly brought to their bearings; and except the argument, to which every attention must be paid, of so learned an advocate as Mr. Russell in *Redhill Gas Co.* v. *Reigate Rural District Council* (1), I have never yet met with any assertion that any provision of the Highways Act of 1835 with regard to the powers of the surveyor under the Highways Act of 1835 extended his powers over roads not adopted by the parish. However, it is not necessary to decide this point. It is possible that there are some powers of inspection which he may have, but they are not powers of control; the statute does not speak as if there were two persons who have the control, or two bodies who have the control; there is one body that has the control over roads in the case of a road not adopted, and it cannot be said that the highway authority has the control. The utmost that can be said is that it has some control, and some very small control, in the matter. Therefore I agree with the judgment of the rest of the Court that this urban district council is not the body which has the control of these three streets and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Solicitor to the Post Office; Ernest Bevir.*

(1) [1911] 2 K. B. 565, 570.

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1913
Dec. 3, 4, 18.

BROOKS, Appellant *v.* INLAND REVENUE COMMISSIONERS, Respondents.

Revenue—Income Tax—Super-tax—Assessment—Assessment under Sched. D for previous Year not conclusive for Purposes of Super-tax—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

For the purpose of assessment to super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the sum at which the taxpayer has been assessed to income tax under Sched. D for the year preceding the year of assessment to super-tax is not conclusive and binding on the Special Commissioners, and the taxpayer may prove what was in fact his income for such preceding year.

So *held* by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting), affirming the decision of Horridge J. [1913] 3 K. B. 398.

Wylie Hill v. *Inland Revenue Commissioners*, 1912 S. C. 1246, approved.

Appeal from a decision of Horridge J. (1) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts upon an appeal by Brooks against an assessment to the super-tax made upon him for the year ended April 5, 1910, in the sum of 8064*l.*, less the statutory allowance of 3000*l.*

Brooks had for several years carried on the business of waste dealer as sole proprietor thereof and had been assessed to income tax in respect of the profits derived therefrom; he was also in receipt of income from other sources. For the year ended April 5, 1909, he was assessed to income tax, Sched. D, in respect of the profits of such business in the sum of 400*l.* by first assessment and in the further sum of 3600*l.* by an additional first assessment, making altogether a total of 4000*l.* He appealed against the said additional first assessment of 3600*l.* to the Commissioners for General Purposes, who on May 9, 1910, determined as a matter of fact that the amount of the profits of the business on the average of the three preceding years and in accordance with the provisions of the Income Tax Acts was 6331*l.* As it appeared to the Commissioners that Brooks ought

(1) [1913] 3 K. B. 398.

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

to have been charged and assessed to an amount beyond the sum of 4000*l.* as assessed, namely, on a total sum of 6331*l.*, they thereupon charged him in an additional sum, namely, 2331*l.*, making a total sum of 6331*l.*

Brooks did not demand a case under s. 59 of the Taxes Management Act, 1880, for the opinion of the High Court thereon as therein provided, and the duty on the assessment of 6331*l.* was duly paid by him.

On June 10, 1910, the Special Commissioners issued a notice to Brooks requiring him to make a return of his total income from all sources for the purposes of assessment to super-tax for the year ended April 5, 1910, in pursuance of s. 72, sub-s. 2, of the Finance (1909-10) Act, 1910, and he delivered a return in which he declared his income from the said business to be 400*l.* and his total income from all sources to be the sum of 2039*l.* 3*s.* 4*d.* The Special Commissioners were not satisfied with that return and accordingly made an assessment according to the best of their judgment, under s. 72, sub-s. 5, of the Act of 1910, in the sum of 8064*l.*, as including 6331*l.* in respect of the profits of his said business and 1733*l.* income from other sources.

The question arising on the case related solely to the item of 6331*l.*; no question arose with reference to the balance (1733*l.*), which for the purposes of the case was accepted as correct as forming part of Brooks' income.

At the hearing of his appeal against the assessment to super-tax Brooks contended that the said assessment or charge amounting to 6331*l.* under Sched. D did not truly represent the assessable income of his said business, but was greatly in excess of such income, and that the over-assessment by the General Commissioners was in the nature of a penalty imposed by them in respect of alleged incorrect returns made by him for the purpose of assessment to income tax for several years prior to the year ended April 5, 1909, and he offered to adduce in evidence accounts relating to the business to shew what his actual income was from the business for the previous year, namely, for the year ended October 31, 1908, being the date immediately preceding April 5, 1909, to which the accounts of the business were made up.

On behalf of the Commissioners of Inland Revenue it was contended before Horridge J. that the assessment or charge amounting to 6331*l.*, determined as aforesaid on appeal, for the year ended April 5, 1909, being the year previous to the year to which such super-tax assessment related, was to be taken to be the income of the appellant from that source for the purpose of super-tax for the year ended April 5, 1910.

Having duly considered the facts and the arguments adduced, the Special Commissioners did not accept the statements of the appellant and declined to receive the said accounts in evidence, being of opinion that those accounts were unnecessary and immaterial, the provisions of s. 66, sub-s. 2 (1), of the Act of 1910 rendering it obligatory on them to regard the sum of 6331*l.* as the appellant's income from his business as for the purposes of the super-tax for the year ended April 5, 1910. They accordingly confirmed the assessment to the super-tax in the sum of 8064*l.*, less the statutory allowance of 3000*l.*

The question for the opinion of the Court upon the case stated was whether in the circumstances the provisions of s. 66, sub-s. 2, of the Act of 1910 rendered it obligatory on the Special Commissioners to regard the said sum of 6331*l.* as the appellant's income from his business for the purposes of the super-tax for

(1) 10 Edw. 7, c. 8:

Sect. 66: "(1.) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the 6th day of April, 1909, in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds 3000*l.*

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; . . . ."

Sect. 72: "(1.) The super-tax shall be assessed and charged by the Commissioners for the Special Purposes of the Acts relating to Income Tax (in this Act referred to as the Special Commissioners).

"(5.) If any person fails to make a return under this section, or if the Special Commissioners are not satisfied with any return made under this section, the Special Commissioners may make an assessment of the super-tax according to the best of their judgment."

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

the year ended April 5, 1910, and also whether the aforesaid proffered evidence was rightly rejected.

Horridge J. held, following the decision in *Wylie Hill* v. *Inland Revenue Commissioners* (1), that the assessment to income tax under Sched. D was not conclusive and binding upon the Special Commissioners for the purpose of the assessment to super-tax, and that they ought to make an independent estimate and could not adopt the assessment to income tax when the subject objected to it as incorrect. He accordingly directed the case to be remitted to the Special Commissioners. From this decision the Commissioners of Inland Revenue appealed.

Sir John Simon, A.-G., Sir Stanley O. Buckmaster, S.-G., and *W. Finlay*, for the appellants. The question is whether the Special Commissioners are bound by the assessment made by the General Commissioners in the district where the trade was carried on in respect of which the assessment under Sched. D was made.

Super-tax is an additional income tax—*Bowles* v. *Attorney-General* (2)—not taxed at the source of the income. A return under Sched. D does not include that part of a man's income which, consisting of interest on investments, is taxed at the source. But on application for exemption or abatement the income which the applicant is required to reveal to the General Commissioners includes both his income assessed under Sched. D and his income taxed at its source. A man who has to make a return for the purposes of super-tax has to make the return in the same way as if he were applying for exemption or abatement, and if he has been already assessed for income tax under Sched. D he cannot rip up that assessment. The amount is fixed and cannot be reopened for the purposes of super-tax any more than it can be reopened for purposes of exemption or abatement. It is final and conclusive: 10 Edw. 7, c. 8, ss. 66 and 72, sub-s. 1, and ss. 163, 164, and 190, Sched. G, of the Income Tax Act, 1842.

By sub-s. 2 of s. 66 the total income of any individual, for the purposes of super-tax, is to be taken to be the total income of that individual for the previous year, estimated in the same manner as the total income is estimated for the purposes of

(1) 1912 S. C. 1246.

(2) [1912] 1 Ch. 123.

exemptions or abatements under the Income Tax Acts. For those purposes the assessment to income tax under Sched. D is conclusive, and it is similarly conclusive for the purposes of assessment to super-tax.

In *Wylie Hill* v. *Inland Revenue Commissioners* (1) it was not necessary for the judges to consider the point which arises in the present case. Where a person's assessment under Sched. D has been finally fixed, it is not open to review when he is being assessed for the purposes of super-tax any more than it can be reviewed for the purposes of claiming and obtaining exemption.

F. Brocklehurst, for the respondent. *Wylie Hill* v. *Inland Revenue Commissioners* (1) is a direct decision upon the point now before the Court. As to *Bowles* v. *Attorney-General* (2) that was not a question of the principles upon which super-tax is to be assessed, but merely dealt with the machinery of its administration and collection. Although super-tax is a tax on income, yet it is a distinct tax. It is outside the general scheme of income tax in respect of the persons charged. It is only chargeable on individuals and not on corporations or companies. The class of property dealt with is personal income only. The intention of the Legislature was to make it a distinct tax. They might have included it in the existing scheme of taxation by putting it in a fresh schedule. Then it would have had to be dealt with on the same principles as the income tax. Again, it is further distinguished in regard to the deductions which are to be made in order to arrive at the net income: s. 66, sub-s. 2 (*a*), (*b*), (*c*). The figure of the General Commissioners is not forced upon the Special Commissioners whose duty it is to make an independent assessment: s. 72, sub-ss. 5, 6, 7. They are entitled to ignore the assessment under Sched. D or any other schedule. Sect. 66, sub-s. 2, is the governing provision. Super-tax is distinct from the general income tax and the Special Commissioners are not in this case bound by the findings of the General Commissioners.

Sir S. O. Buckmaster, S.-G., in reply. So much of the income of the subject to be assessed to super-tax as arises from profits on

(1) 1912 S. C. 1246. (2) [1912] 1 Ch. 123.

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

trade or business has to be determined by assessment under Sched. D, which for this purpose is to be treated as final. The observations in *Wylie Hill* v. *Inland Revenue Commissioners* (1) which appear to be against the contention of the Crown in this case were not made with reference to the arguments put forward in this case. The question of deductions is quite immaterial.

Cur. adv. vult.

Dec. 18. COZENS-HARDY M.R. This appeal relates to super-tax, and involves the consideration of statutes beginning in 1842 and ending in 1910. I venture to think the time has come when all the Income Tax Acts ought to be consolidated, so that it may be reasonably possible for the subject to ascertain the nature and extent of his liability.

Super-tax is imposed by s. 66 of the Finance (1909-10) Act, 1910. It is called an "additional duty of income tax." It differs from income tax in many ways. It is not taxed at the source. It depends upon the total income of an "individual" from all sources being in excess of 5000*l.* a year. It is not calculated, like Sched. D, upon an average of three years. It is payable on a figure arrived at by reference to the income of the year previous to the payment. It is assessed by the Special Commissioners (s. 72), who are not the Commissioners who usually assess income tax.

By sub-s. 2, for the purposes of the super-tax the total income of any individual is to be taken to be the total income of that individual from all sources for the previous year "estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts"—subject to certain special deductions upon which nothing turns in the present case. These words refer (inter alia) to ss. 133, 134, 163, 164, and 190 of the Act of 1842, ss. 48 to 57 of the Act of 1880, and ss. 23 to 27 of the Act of 1907.

For the purpose of income tax the subject has to make a return, or statement, of his income exclusive of income taxed at

(1) 1912 S. C. 1246.

its source (s. 52 of the Act of 1842). An assessment once made is—subject only to appeal—final (s. 57 of the Act of 1880). And there are provisions limiting the time within which appeals must be presented.

If the accuracy of the assessment is not disputed, there may be a claim for exemption or abatement. Sched. (g.) XVII. to the Act of 1842 sets forth the "Lists, declarations, and statements of discharge or in order to obtain exemptions," the first of which is: "Declaration of the amount of value or property or profits returned, or for which the claimant hath been or is liable to be assessed." The language is peculiar, but it seems to contemplate a claim for exemption before any assessment has been made, as well as after. The Commissioners in the district where the claimant resides are the persons to deal with any such claim.

The contention of the Crown is that an assessment to income tax under Sched. D by General Commissioners is conclusive for all purposes, and that the Special Commissioners in estimating income for the purposes of super-tax are bound to accept that figure, and that the subject is equally bound. It is, however, admitted that every other item in the statement or return furnished by the subject is open to question.

I am unable to accept this contention. A duty is imposed by statute upon the Special Commissioners to "estimate" the total income, and for that purpose to consider the statement (if any) submitted by the subject. If the subject says that the sum upon which he paid income tax under Sched. D was not accurate, I see no reason why he should be estopped from raising the point. The Special Commissioners have ample powers to check the statement and they can either allow or reject the subject's claim.

This is the single point raised in the present appeal. Brooks was assessed for the year ended on April 5, 1909, in respect of the profits of his business at 6331*l.* and he paid income tax on that sum. In response to a notice from the Special Commissioners in June, 1910, Brooks delivered a return stating (inter alia) that the income of his business was 400*l.* The Commissioners declined to accept any evidence on this item, and held it obligatory to treat the profits as 6331*l.*

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M. R.

Horridge J. held that the Commissioners were wrong and I agree. The learned judge followed a decision of the Court of Session in *Wylie Hill* v. *Commissioners of Inland Revenue.* (1) That was a case where the appellant had been assessed under Scheds. A and B in respect of properties owned and occupied by him. He made no claim for deduction in respect of farming losses under s. 23 of the Act of 1890, and paid the full income tax. He was out of time for appealing under s. 23. On appeal against the super-tax assessment, he claimed a deduction under s. 23. The Special Commissioners refused. But the judges in the Court of Session unanimously held that the Commissioners were bound to consider the claim. In principle, this is not distinguishable from the present case, and I am glad to find the view which I have expressed confirmed by the very high authority of Lords Dunedin, Kinnear, and Johnston.

I think the appeal must be dismissed.

SWINFEN EADY L.J. The question raised by this appeal is whether for the purpose of assessment to super-tax in any year the assessment to income tax under Sched. D for the previous year must be taken as conclusive and binding both on the Crown and on the subject, or whether upon an assessment to super-tax in any year the portion of such assessment which is based upon the assessment under Sched. D for the previous year may be questioned or varied. No distinction has been drawn between Sched. D and Sched. C and Sched. E, where (in the case of Sched. E) income is not taxed at its source, but is made the subject of assessment. Super-tax is an additional income tax, within the words "duties of income tax" in s. 30 of the Customs and Inland Revenue Act, 1890: *Bowles* v. *Attorney-General.* (2) By the Finance Act, 1910, s. 66, sub-s. 2, "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts," but with certain further deductions: see sub-ss. (*a*), (*b*), (*c*), (*d*).

(1) 1912 S. C. 1246.

(2) [1912] 1 Ch. 123.

By s. 72 super-tax is to be assessed and charged by the Special Commissioners, upon whom extensive powers are conferred by the section.

The super-tax for any year is based upon the income of the individual for the previous year. It is not collected at its source, as ordinary income tax is in many cases. For the purpose of ordinary income tax, a return is not required of the subject's income taxed at the source, but only of that portion of the subject's income not so taxed. For the purpose of super-tax a return is required of the whole of the subject's income from all sources, and the super-tax is assessed and charged on the whole of it, less the statutory deductions. The income of the subject is to be "estimated in the same manner" as the total income from all sources is estimated for exemptions or abatements. This decides the manner in which the income is to be estimated. It is quite different from the manner in which the income of the subject is estimated for the purpose of assessment to ordinary income tax, when income upon which tax is paid by deduction is not included in the return. The manner is to be the same as on claims for exemption or abatement, when income from every source must be brought in, for the purpose of ascertaining whether the subject is entitled to the exemption or abatement claimed.

By the Income Tax Act, 1842, s. 190, the Schedule G with the rules and directions contained therein is to be observed by the persons to whom it applies, and Form XVII. is the form to be used by a person wishing to obtain exemption. Under paragraphs 1 and 2 of Form XVII., all the income of the claimant has to be returned; paragraph 1 is the subject of assessment under Scheds. B, D, and sometimes E. Paragraph 2 is all income taxed at its source; paragraph 3 extends to deductions; paragraph 4 shews the result of the three preceding paragraphs. These detailed paragraphs point out "the manner" in which income is to be estimated for the purpose of exemption, and for super-tax the manner is to be the same. There is no provision rendering any assessment by the General Commissioners under Scheds. B, D, and E binding on the Special Commissioners who assess super-tax. The statute only deals with "the

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

manner" in which the income is "to be estimated." In the ordinary course of events, the amount assessed to ordinary income tax would probably be taken as the amount to be brought into account in respect of the Schedules B, D, or E for which the assessment was made, but not as conclusive. Indeed, application may have been made for relief under s. 23 of the Finance Act, 1890, s. 27 of the Finance Act, 1896, or s. 24 of the Finance Act, 1907, without the assessment having been amended, and in such case the Special Commissioners could not properly adopt the original assessment, although remaining unaltered, but should have regard to the circumstances which have supervened since the original assessment was made, and assess super-tax according to the altered circumstances.

Again, if any person fails to make a return, or the Special Commissioners are not satisfied with any return, they may under s. 72, sub-s. 5, make an assessment of the super-tax according to the best of their judgment. There is nothing there to compel them to follow the amount previously assessed upon the tax-payer under Scheds. B, D, or E so far as applicable.

I am of opinion that the assessments to income tax under Scheds. B, D, or E respectively are not absolutely binding and conclusive for super-tax on either the Crown or the subject. I agree with the opinion expressed by the Court of Session in *Wylie Hill* v. *Inland Revenue Commissioners*. (1) In my opinion the appeal fails.

PHILLIMORE L.J. This appeal raises a question on s. 66 of the Finance (1909-10) Act, 1910, which provides for super-tax.

It arises upon a case stated between John Henry Brooks and the Commissioners in the following way.

Brooks was assessed for the year 1908-9 for income tax, Sched. D, upon his business as a waste dealer. He returned his profits upon the average of the three preceding years at 400*l.*; but this return was not accepted and he was assessed at 4000*l.*

He thereupon appealed to the Commissioners, and it was by them determined that his income should be assessed at 6331*l.*

He was then required to make a return for the purposes of super-

(1) 1912 S. C. 1246.

tax, and he returned his income from other sources at 1639*l.*, and repeated his return that his income from the waste business was 400*l.*

The Special Commissioners, not being satisfied with that return, made an assessment under s. 72 of the Act of 1910. By this assessment they slightly raised the sum which he had returned as income from other sources to 1733*l.*, and in respect of Sched. D they inserted the figure for which he had been assessed on his appeal, namely, 6331*l.*

No question arises as to the assessment of the other sources of income, but as regards assessment under Sched. D Brooks contended that 6331*l.* was greatly in excess of his income, and he offered to produce certain evidence to prove this.

On the other hand the Commissioners of Inland Revenue insisted that 6331*l.* must be taken to be a concluded figure as well for super-tax as for Sched. D, and the Special Commissioners took that view and declined to receive the evidence tendered by Brooks.

Thereupon they were asked to state a case and they have done so, and the questions which they have asked are, whether the provisions of s. 66 rendered it obligatory on them to regard the sum of 6331*l.* as Brooks' income from his business, and whether they rightly rejected the proffered evidence.

On the argument in the King's Bench Division it was admitted that the proffered evidence would not of itself, if tendered, have been appropriate, or at any rate sufficient. But the Crown desiring to take no technical objection and to have the principal point decided, it was agreed that for the purposes of the decision it should be considered that Brooks had tendered such evidence as would be appropriate to shewing that the sum of 6331*l.* was an untrue estimate, if it was open to him to do so.

In the Court below Horridge J. was informed that there was a decision of the First Division of the Court of Session in Scotland which in principle determined this case in favour of Brooks (*Wylie Hill* v. *Inland Revenue Commissioners* (1)), and following precedent in such matters he thought that he ought to decide in conformity with the opinion of the Scotch Court, and, without

(1) 1912 S. C. 1246.

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

expressing any opinion of his own, he so decided in favour of Brooks. And now the Crown is appealing.

Sect. 66 imposes the duty and also directs the mode of assessment: "The total income of an individual from all sources shall be taken to be the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts."

This throws us back on ss. 163 and 164 of the Income Tax Act, 1842, and Sched. G, s. 190, of the same Act, which provide the procedure in order to obtain exemption, a procedure which has been adapted to the provisions in respect of abatement under the Income Tax Act, 1853, and subsequent Acts.

By s. 164 of the Act of 1842 a claimant seeking exemption is, with his claim, to send a declaration and statement setting forth all the sources from which his income arises, and the amount of any charges thereon, and any sum which he may have charged or been entitled to charge against any other person for duty, or which he might have deducted or retained out of his payments.

The inspector or surveyor is to peruse this declaration and statement and make certain inquiries; if he approves it, the Commissioners may allow the exemption; if he does not approve, the merits are to be heard by the Commissioners for General Purposes, who are to determine thereon. It follows that the declaration and statement—for which words in later Acts and forms, I think, the word "return" is substituted—will contain, or may contain, items under several of the schedules.

Presuming that the claimant is carrying on some profession or business, his modest income therefrom will be assessed under Sched. D.

If he has an income from dividends and so forth which are taxed at the source, and which come under Sched. C, he will have to collect and enumerate them. He may also have some income under Sched. A, or, conceivably, under Scheds. B or E.

Sched. G provides, in not very grammatical language, that the return shall contain "First, Declaration of the amount of value or property or profits returned or for which the claimant

hath been or is liable to be assessed"; secondly, of the amount of income taxable at the source; thirdly, of any annual payment that he has to make out of his property or profits; fourthly, a statement of the amount of his income derived according to the three preceding declarations; and fifthly, statements of any payments which he has to make and out of which he can deduct or retain duty, or a charge which he can make against any one else for such duty.

It would seem that there might be room for legitimate diversity of opinion between the taxpayer and the Crown leading to an appeal to the Commissioners for General Purposes upon matters contained in declarations 2, 3, and 5. There will also be room for similar divergence of opinion upon some at least of the items in the first declaration. The inspector or surveyor may say that the claimant has not included all his income taxed at the source under Sched. C or his income under the other schedules assessed or unassessed, and in this way the whole return may be a matter of appeal, because, at least, some of the items which compose it will be appealable matters

This leaves for consideration the question whether the item under Sched. D will be, if it has been already assessed, open to re-examination upon the appeal.

Under the first declaration the claimant is to state the amount of value of property or profits returned, or for which he has been or was liable to be assessed. If he has been already assessed in respect of one item, to wit, under Sched. D, can he make a return other than one which conforms to the assessment? And whether he can or not, will he not be as to this item concluded by the assessment whether already made when he makes his claim, or made subsequently?

As a contribution to the answer to this question the Attorney-General pointed out the great inconvenience of allowing this item to be reopened. The claimant in case of dispute appeals to the Commissioners for General Purposes for the district where he resides. They are the people best qualified to judge of his total income. But the assessment under Sched. D is made by the Commissioners of the place where he carries on his business or profession, very possibly a different body.

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

It would be unreasonable that the Commissioners for the district where he resides, who have not the same means of informing themselves as the Commissioners of the district where he carries on his business, should sit on appeal from the last-mentioned Commissioners, and that a further appeal should thus be given in the case of small incomes and small assessments which does not exist for taxpayers subjected to large assessments. It seems to me there is great force in this point.

However this may be, there is a broader ground. If the two parties to a controversy have had the matter in dispute finally determined between them by the ultimate tribunal, they ought not, nor ought either of them, to be allowed to reopen that dispute on any such ground as that the matter which has been decided subsequently becomes an item in another account, even though this other account has, in respect of its other items, or its casting, to be inquired into by a fresh tribunal. If this be the construction of the statutes when a taxpayer applies for exemption or abatement, s. 62 of the Act of 1910, by the words already quoted, provides that for super-tax the total income should be "estimated in the same manner"; and by s. 72, sub-s. 6, the appropriate provisions of the Income Tax Acts as to procedure are, with the necessary modifications, applied to the assessment and recovery of super-tax.

Early in the argument I was struck by a difficulty which subsequent consideration has removed. The mode of arrival at the income of the super-tax payer is conventional, and when you come to super-tax there is in respect of so much of his income as is assessable under Sched. D conventional assessment upon conventional assessment.

In ordinary cases under Sched. D the income for the fourth year is arrived at by taking the average of the income of the three previous years.

For super-tax the payer is assessed and pays upon his income of the fifth year, measured—and conventionally measured—by his income of the preceding year. His income, as the statute says, is to be taken to be his total income from all sources of the preceding year. Assuming that the income of the taxpayer is rapidly falling so that his income of the fourth year is much

below the average of the three previous years, and his income of the fifth year much below the fourth, and remembering that super-tax is not payable because the taxpayer had a large income in the preceding year but is a tax on the income of the current year, measured by the income of the preceding year, very great hardship might ensue to the owner of a rapidly falling income.

I do not think that the first answer which the Attorney-General gave to this objection was satisfactory. He drew attention to the fact that there was another side to the shield and that the Crown would lose in respect of a taxpayer whose income was rapidly rising. We are not dealing with a gaming establishment in which the Crown is croupier or banker, and the taxpayers are gamblers willy nilly, and it is poor consolation to A., whose income is falling, while his tax burdens continue, to be told that his more prosperous neighbour B. is not even paying his rateable share of taxation.

But I think that the provisions of s. 134 of the Income Tax Act, 1842, which enables in certain very striking cases relief to be given upon an assessment under Sched. D with a repayment, if necessary, of duty and an amendment of the assessment, would meet some of the more striking cases of hardship, for I conceive that upon an amendment of the assessment under Sched. D would follow a corresponding amendment of that item in the assessment for super-tax.

And with regard to cases of gradual diminution of income, s. 24 of the Finance Act, 1907, makes a somewhat similar provision, and though it is true that the section does not contain any direction to have the assessment amended, such as one finds in s. 134, and did find in s. 133 (now repealed) of the Act of 1842, still I think the words "he shall be entitled to be charged on the actual amount of the profits or gains so arising instead of on the amount of the profits or gains so computed" would avail him to have his original assessment treated as superseded pro tanto, and that at any rate the Special Commissioners would have the duty, under sub-s. 7 of s. 72, to amend their assessment accordingly.

In the same way he will get relief in cases falling under the Act of 1890 according to the case of *Wylie Hill* v. *Inland Revenue*

C. A. 1913

BROOKS v. INLAND REVENUE COMMISSIONERS.

Phillimore L J.

Commissioners (1) in the Court of Session. This decision, which has been supposed to be inconsistent with the case of the Crown, may well stand though our judgment in the present case should be in favour of the Crown. There the taxpayer had a claim to relief and a return of duty in respect of another provision in the Income Tax Acts in pari materia with the provisions in s. 24 of the Act of 1907. But the particular relief had to be claimed within a certain period. The applicant had not troubled when it was a question of ordinary income tax, but when he found himself by a retrospective statute—for such is the Finance Act of 1910—burdened with super-tax, he not unnaturally sought to collect all the relief that he could, and asked, not that his assessment under Sched. B might be reopened, but that it might be taken as modified when introduced as an item in the account for super-tax by the relief which he could have had in respect of it if he had asked for it in time. His was a very reasonable demand which I should have thought the Crown would have done well to comply with if it was possible in any way to waive the objection of time.

But on the Crown choosing to fight, the decision is not that the assessment was to be altered, for the assessment remains in these cases, but that the item was to be carried in to the super-tax account as a qualified item, assessment minus authorized repayment.

No doubt there are statements in the reasons given by Lord Johnston on behalf of the Court which go very much farther and appear to treat the matter as if every item could be reopened in the assessment of super-tax. With those expressions I respectfully disagree.

Upon the whole I am of opinion that the appeal succeeds, but as my colleagues are of an opposite opinion, the appeal will be dismissed.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue ; Rawle, Johnstone & Co., for Hardicker & Hanson, Manchester.*

(1) 1912 S. C. 1246.

G. A. S.

WALTERS *v.* W. H. SMITH & SON, LIMITED.

1913
Oct. 29, 30;
Nov. 8;
Dec. 3.

[1913 W. 10.]

False Imprisonment—Defence to Action for—Arrest without Warrant by Private Individual—Felony for which Plaintiff arrested not committed—Other Felonies committed by some Person other than Plaintiff—Reasonable and Probable Cause to suspect Plaintiff of having committed the other Felonies.

A private person is justified in arresting another on suspicion of having committed a felony if, and only if, he can shew that the particular felony for which he arrested the other was in fact committed, and that he had reasonable and probable cause for suspecting the other of having committed it.

FURTHER CONSIDERATION.

The action was brought by the plaintiff, Walters, against the defendants to recover damages for false imprisonment and malicious prosecution.

The following statement of the facts is taken from the judgment of Sir Rufus Isaacs C.J.

"The plaintiff brought this action to recover damages for false imprisonment and malicious prosecution. It was tried by me with a special jury to whom I submitted certain questions to which they gave the following answers:—(1.) Did the defendants take reasonable care to inform themselves of the true facts of the case?—Yes. (2A) Did the defendants honestly believe that the plaintiff had stolen the book?—Yes. (2B) Did the defendants reasonably believe that the plaintiff had stolen moneys and stock (other than the book 'Traffic') from the bookstall?—Yes. (3.) Were the defendants in instituting the criminal proceedings actuated by malice?—No. (4.) What damages for false imprisonment?—75*l.*

"I ruled that there was not an absence of reasonable and probable cause for the prosecution. Thus the plaintiff failed and the defendant succeeded upon the claim for malicious prosecution, and the claim for false imprisonment remained to be dealt with.

"During the trial it was contended by the plaintiff that, inasmuch as the defendants admitted that no felony had in fact

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

been committed in respect of the book 'Traffic' there was no defence to the claim based upon false imprisonment. The defendants contended that all that they need establish as legal justification for the imprisonment was (1.) that an actual felony or felonies had been committed, and (2.) that they had reasonable and probable cause for suspecting the plaintiff of having committed an actual felony or actual felonies; in other words, it was argued for the defendants that it was not essential to their defence to prove that the felony for which the plaintiff was arrested had in fact been committed. In order to give the defendants the opportunity of raising this point of law I left question (2B) to the jury, which was answered in favour of the defendants. Both parties claimed judgment upon the verdict of the jury. The matter was then argued before me, and I received great assistance from counsel on both sides, who argued the case with great ability. It was agreed by counsel for the parties that I should be at liberty to find any further facts which might become necessary. So far as they are material to the questions now raised the facts are that the plaintiff was, and had been for some nine years, in the employment of the defendants as assistant manager at a bookstall at the King's Cross Railway Station of the Great Northern Railway, where some five other persons were also employed under a manager. Early in 1912 it was discovered at the usual half-yearly stocktaking that there was a deficiency of 126*l.* which pointed to dishonesty and thefts by one or more of the defendants' servants. Stock was again taken in February, when the deficiency was 154*l.*, and again in April, 1912, when it was 148*l.* Such a deficiency was inexplicable except upon the basis that money or stock, or both, had been stolen; probably only money was taken, but it might well be that stock also had been stolen. It is clear, and indeed it was not, and could not be, disputed by the plaintiff at the trial, that a felony, or more probably a series of felonies, had been committed which caused the deficiency, and it was unlikely that they could have been committed otherwise than by a person employed by the defendants at this bookstall. The defendants in order to detect the culprit, and acting upon advice,

thereupon set what was called 'a trap.' Copies of a book called 'Traffic' were marked and delivered to the bookstall at King's Cross. An agent of the defendants went to a shop at Staines kept by the plaintiff and his wife, where magazines and newspapers were sold, to purchase a copy of 'Traffic.' On a later day he called, and one of the marked copies was sold to him in exchange for the price which he then paid. The book had been taken on June 15, 1912, by the plaintiff from the bookstall without payment having been made, and without the knowledge of the manager or other assistants at the bookstall. These facts when ascertained were duly reported, on June 19, to Mr. Kimpton, a manager of one of the defendants' departments, to whom the elucidation of the mystery had been entrusted. In addition, and as the result of inquiries, it was discovered that the plaintiff had acted in various respects in contravention of the practice regulating his employment by the defendants, which he knew he was bound to observe, and that in particular he, with his wife's assistance, had commenced, and was carrying on, a business where newspapers and magazines, and occasionally books, were sold. All these facts were thereupon reported to Mr. Hornby, one of the members of the defendant firm. The plaintiff was asked into a room, and in answer to questions put to him made statements which were of a very unsatisfactory character, and wholly failed to give an explanation of his possession of the book 'Traffic.' Mr. Hornby honestly believed that the plaintiff had stolen the book 'Traffic' and that the plaintiff had committed the thefts of money or books from the bookstall which had caused the deficiency, and at the end of the interview Mr. Hornby gave the plaintiff into the custody of Sergeant Budge, who had been employed in the matter as a detective officer. The plaintiff was taken to the police court and charged with stealing the book 'Traffic.' He was committed for trial and was eventually tried at the County of London Sessions held at Newington and acquitted; the defence was that in taking the book he had no felonious intent, which the jury accepted. At the hearing before me it was admitted by the defendants that the plaintiff had not stolen the book, but had taken it away with the intention of subsequently accounting or paying for it, and no imputation now

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

rests upon him in connection with this transaction, and no suggestion is made against him of being party to the acts of theft or dishonesty which caused the deficiency.

"Having regard to the facts proved I have no doubt that the defendants had reasonable and probable cause for suspecting the plaintiff of having stolen the money or books other than the book 'Traffic' when they gave the plaintiff into custody. I further find as a fact that the plaintiff was given into custody for stealing the book 'Traffic,' and that although the defendants when they caused his arrest were convinced that the man who stole 'Traffic' was also guilty of the other thefts, they did not cause his arrest for those other thefts, but only for that theft of which they thought they had clear evidence. Doubtless they were influenced in taking this course by the suspicion, and indeed conviction, in their minds that the plaintiff had committed the other thefts. It induced them to give him into custody for stealing the book, whereas otherwise they might merely have summoned him or indeed might not have prosecuted him at all."

Clavell Salter, K.C., and *F. F. Daldy*, for the defendants. The key to the solution of this case is the necessity of distinguishing between two separate and distinct duties cast upon citizens by the common law. Those duties are (1.) acting as a citizen in aid of the Executive; (2.) acting as a citizen in bringing a prosecution. The law has always protected citizens in aiding the Executive by arresting suspected persons. In early days it depended almost entirely upon unofficial assistance for the arrest of suspected persons. But although that is not so at the present day, the necessity for the protection of the citizen is as great as ever it was. Some kind of formulation of suspicion accompanies every case where a person is given in charge. Only two elements are necessary in order to justify a citizen arresting another on suspicion of having committed a felony: 1. A reasonable suspicion of actual felony, i.e., an actual and reasonable suspicion that the person arrested has committed a felony which has actually been committed by some one. 2. There must be no further or greater interference with the liberty of the person arrested than is necessary to put the matter

in train for judicial inquiry. In the present case no felony had been committed with regard to the book "Traffic," but the defendants reasonably and with probable cause thought that it had, and felonies had actually been committed with regard to other books. The defendants reasonably suspected the plaintiff of having committed a number of felonies, and some of them had actually been committed, although not by him, and they used no more detention with regard to the plaintiff than was necessary to set the law in motion. The arrest of a person is one thing; the formulation of a charge against him before a magistrate is an entirely distinct matter. The justification for the arrest of a person depends upon suspicion — not upon the nature of the charge which is subsequently brought against him. A citizen has performed his duty if he arrests another on suspicion of actual felony and takes him to the threshold of justice. There may or may not be a charge formulated subsequently against the arrested person. The charge which is formulated is only relevant in so far as it is evidence of what the suspicion was which was in the arrester's mind at the time he arrested the other person. The threshold of justice is crossed when the charge sheet is signed. The defendants are responsible for all that they did from the moment they arrested the plaintiff till they signed the charge sheet for stealing the book "Traffic," and they must shew that during that time they had in their minds a reasonable suspicion against the plaintiff of actual felony. During that time they reasonably suspected the plaintiff of a series of felonies. It is impossible to say how many were in fact committed, but the defendants were actuated by the suspicion that the plaintiff had committed felonies which had actually been committed by some one. The charge before the magistrate which may be made after the arrest is not necessarily made by the arrester. The police or the Treasury may take up the inquiry. The judicial inquiry is in fact quite irrelevant to the arrest. In Hale's Pleas of the Crown, vol. i. (ed. of 1800 by Dogherty), p. 588, it is laid down that "if a felony be committed in fact, and A. suspects B. did it, and hath probable cause of suspicion, A. may arrest B. for it, and justify it in an action of false imprisonment."

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

The actuating suspicion in Mr. Hornby's mind was the series of larcenies of money and the other books, and those were felonies which had actually been committed. The defendants are therefore entitled to succeed in this action. They could only be liable if upon the evidence it appeared that larceny of the book "Traffic" was the only actuating felony. If one citizen deprives another of his liberty upon a reasonable suspicion of having committed ten felonies and nine felonies have been committed the arrester is protected. In Chitty on Pleading, 7th ed., vol. iii., p. 334, note (*f*), it is stated "Semble, it would suffice to prove some of the alleged acts of felony, &c.: *Atkinson* v. *Warne*" (1), although that decision does not appear to support the statement. [*Mure* v. *Kay* (2); *Stammers* v. *Yearsley* (3); *Hall* v. *Booth* (4); *Timothy* v. *Simpson* (5); *Sewell* v. *National Telephone Co.* (6); Chitty on Pleading, 7th ed., vol. iii., p. 333; and Bullen and Leake's Precedents of Pleading, 3rd ed. (1868), pp. 795, 796, were also referred to.]

St. John Hutchinson, for the plaintiff. The plaintiff was given into custody upon the single charge of stealing the book "Traffic." As a general principle the common law has always been very jealous of the liberty of the subject, and has always held that it should not be taken away without just cause. In Dalton's Country Justice (ed. of 1655), p. 406, it is laid down that "The liberty of a man is a thing specially favoured by the common law of this land; and therefore if any of the King's subjects shall imprison another without sufficient warrant of him, or his law, the party grieved shall have his action, and shall recover damages against the other; and the King also shall have a fine of him: for imprisonment of another without offence of the law is one of the King's royal prerogatives, and only annexed to the Crown."

In the Earl of Halsbury's Laws of England, vol. ix., p. 296, it is said that "At common law the power of a private person to arrest is limited to cases where treason or felony has been actually committed or attempted, or where there is immediate danger of treason or felony being committed, or where a breach

(1) (1834) 6 C. & P. 687.
(2) (1811) 4 Taunt. 34.
(3) (1833) 10 Bing. 35.
(4) (1834) 3 Nev. & M. 316.
(5) (1835) 5 Tyr. 244.
(6) [1907] 1 K. B. 557.

of the peace has been actually committed or is apprehended." The special protection which in certain cases has been given to a private person who arrests another is grounded upon necessity or because there is inordinate danger. It would be very dangerous to broaden still further the cases in which the liberty of the subject—perhaps the happiest creature of the English law—may be affected. An application can be made to a magistrate for a warrant. In order to justify an arrest by a private person there must be a reasonable suspicion of a felony which has actually been committed and that felony must be the felony for which the arrest is made. Otherwise a defendant in an action for false imprisonment might be able to say in effect to the plaintiff, "Although you are innocent of the felony for which I caused your arrest I intend to prove that you committed a felony ten years ago and I therefore have a defence to your action." In that way the defendant would be able to set up a previous felony with perhaps no connection with the felony the subject of the arrest and of which the defendant had no evidence but suspicion merely. In the present case the fact that the defendants gave the plaintiff into custody for stealing the book "Traffic" prevents them from relying on the other felonies. [*Cowles* v. *Dunbar* (1); *Allen* v. *Wright* (2); *King* v. *Metropolitan District Ry. Co.* (3); Roscoe on Evidence at Nisi Prius, 18th ed., vol. ii., p. 922; and *Beckwith* v. *Philby* (4) were also referred to.]

Daldy replied.

Dec. 3. SIR RUFUS ISAACS C.J., after stating the facts above set out, continued: If as a matter of law the defendants must prove that the particular felony for which the plaintiff was imprisoned had in fact been committed they have failed in their defence, inasmuch as no felony with regard to "Traffic" had in fact been committed. If as a matter of law the defendants may justify the imprisonment by proof that at the time of the arrest of the plaintiff felonies had been committed other than that for which he had been arrested, and that they had reasonable and

(1) (1827) 2 C. & P. 565, at p. 567
(2) (1838) 8 C. & P. 522.
(3) (1908) 72 J. P. 294.
(4) (1827) 6 B. & C. 635.

1913

WALTERS
v.
W. H. SMITH & SON, LIMITED.

Sir Rufus Isaacs C.J.

probable cause for suspecting the plaintiff of having committed them, they would be entitled to succeed.]

That is, in my view, the precise question for decision in this case, and one which, so far as I am aware, has never been expressly decided, and for that reason I have gone carefully into the facts and set them out in detail in order that, should it be desired to argue the case further, all the findings of fact will be found in my judgment.

It was strenuously argued before me by counsel for the defendants that in ordering the arrest of the plaintiff they had only caused such an interference with his liberty as was necessary to put matters in train for judicial inquiry, and that the charge subsequently formulated against the plaintiff in the legal proceedings should not be regarded in the claim for false imprisonment. I cannot accept that view inasmuch as it became quite clear during the course of the case, as I have found, that the plaintiff was arrested for stealing the book; and I must deal with the case upon that basis. Interference with the liberty of the subject, and especially interference by a private person, has ever been most jealously guarded by the common law of the land. At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed although it afterwards appears that no felony has been committed, but that is not so when a private person makes or causes the arrest, for to justify his action he must prove, among other things, that a felony has actually been committed: see per Lord Tenterden C.J. in *Beckwith* v. *Philby*. (1) I have come to the conclusion that it is necessary for a private person to prove that the same felony had been committed for which the plaintiff had been given into custody. In Hawkins' Pleas of the Crown, 7th ed. (1795), bk. ii., ch. xii., p. 163, the law is thus stated: "As to the fourth particular, namely, in what manner an arrest for such suspicion is to be justified in pleading. Sect. 18. It seems to be certain, that . . . . regularly he ought expressly to show that the very same crime for which he made the arrest, was actually committed."

(1) 6 B. & C. 635.

In Hale's Pleas of the Crown (ed. of 1800), vol. ii., ch. x., p. 77, s. 78, clause iii., the law is thus stated: "The third case is, there is a felony committed, but whether committed by B. or not, non constat, and therefore we will suppose that in truth it were not committed by B. but by some person else, yet A. hath probable causes to suspect B. to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable, and the reason is because if a person should be punished by an action of trespass or false imprisonment for an arrest of a man for felony under these circumstances, malefactors would escape to the common detriment of the people. But to make good such a justification of imprisonment, 1. there must be in fact a felony committed by some person, for were there no felony, there can be [no] (1) ground of suspicion. Again, 2. the party (if a private person) that arrests must suspect B. to be the felon. 3. He must have reasonable causes of such suspicion and these must be alleged and proved." In quoting as I do that statement of the law by a very distinguished and celebrated Lord Chief Justice I lay particular stress upon his reference to what it is necessary to prove as a justification of imprisonment, although the language may be in this connection a little ambiguous. It is under the second head, "the party (if a private person) that arrests must suspect B. to be the felon." I take that to be that the person must suspect B. to be the felon who has committed the felony for which the person has arrested, and, in order that there should be no doubt about it, I have considered the authorities which were quoted both in Hale's Pleas of the Crown and Hawkins' Pleas of the Crown, and I find particularly in the one authority of "Pulton de pace Regis et Regni" at pp. 12, 13 of the edition of 1609 that the law is thus stated: "Suspicion only without a felony committed, is no cause to arrest another. But if a felony be done in those parts, and one doth suspect another to have committed the same felony, then he may arrest him." That authority is cited in Hawkins' Pleas of the Crown, as is also Finch's Law, a book written by Sir Henry Finch in the

(1) This word, which appears in the first edition, 1736, is omitted by printer's error in ed. 1800.—F. P.

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

Sir Rufus Isaacs C.J.

time of Charles I.; and quoting from p. 340 of an edition which was printed in 1759, I find this is a statement of the law: "Neither can any man arrest one for a trespass unless it be the constable; nor for a felony except himself suspect the party (though he doth it by the condonement of one that doth suspect him) and that the same felony be indeed committed." He refers for this purpose to 11 Edw. 4, and also to the section with which I have already dealt, in Hawkins' Pleas of the Crown.

The case which is nearest to the one which we are at present considering is in the Year Book 27 Hen. 8, p. 23, where the plea was that divers cattle were stolen, and the defendant suspected the plaintiff of stealing six cattle. That plea was held bad on the ground that the defendant must prove that the thing which he suspected the plaintiff of stealing was in fact stolen. It is not the precise point, but it is at any rate the nearest to it that I have been able to find.

Mr. St. John Hutchinson on behalf of the plaintiff also quoted Dalton's Country Justice, where at p. 408 it is said: "The party that shall arrest such suspected person, must have a suspicion of him himself and for the same felony, or otherwise suspicion generally is no cause to arrest another." It was argued that the words "suspicion generally" mean that suspicion of other felonies which had in fact been committed would be no justification for arrest in a civil action. I am not satisfied that that is the true meaning to be given to those words. I think they can be quite justified by the explanation that a general suspicion of a person, although a felony had not been committed, would be enough, as indeed it would be in the case of a police constable in the circumstances to which I have adverted. But the other words are precise, that is to say, that the party who shall arrest a suspected person must have a suspicion of him and for the same felony. I doubt very much whether that statement in Dalton's Country Justice really carries the case any further. I mention it because much reliance was placed upon it on behalf of the plaintiff by Mr. St. John Hutchinson. My attention was also directed to a more modern authority, namely, Bullen and Leake's Precedents of Pleading, 3rd ed. (1868) at p. 797,

This authority was produced by the defendants for another purpose to which I will refer in a moment, but in the note at p. 795 I find the law thus stated: "A private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it"—that means the felony for which he has been arrested. I doubt whether the two cases cited are in themselves a sufficient authority for the proposition there laid down, but I am satisfied that, as indeed one would expect to find in this very learned work, it is an accurate statement of the common law. I cannot find that any doubt has ever been expressed as to the accuracy of this proposition. On behalf of the defendants Mr. Clavell Salter attached some importance to Chitty on Pleadings, vol. iii., pp. 333 and 334, which contains a plea in bar in an action for trespass, and no doubt there the plea was in terms that the arrested person was given into custody (I am not using the exact language) for the purpose of setting on foot a judicial inquiry or legal proceeding, and that was very persistently and very ably relied upon before me. For the reason I have already given I do not think that in this case it assists the defendants, as I am quite convinced that the dominant intention in the minds of the defendants, as was shewn by the fact of the arrest, was to give the plaintiff into custody for having stolen the book and not merely for the purpose of setting on foot a judicial inquiry or formulating subsequently the charges upon which he was arrested. I think on examination of that plea it will be found that it does not support, or at least does not assist in, this case, because as a matter of law I think it is perfectly right to say (and it will be found in the pleas in all the old books on pleading) that there is a statement such as Mr. Salter argued must be pleaded, that it must be pleaded in substance that the plaintiff had been given into custody for the purpose of setting on foot a judicial inquiry, because were it otherwise there could be no justification for the arrest, and no private person would be justified in detaining a person in his own room or in his own house merely for the purpose of detention or punishment. His only justification, given the other circumstances which I have indicated, must be

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

Sir Rufus Isaacs C.J.

that he did it for the purpose of setting on foot a judicial inquiry. It is only by means of judicial process that the arrest can otherwise be justified. The mere fact of arrest for the purpose of detaining a person and not setting on foot a judicial inquiry could not be justified. It is in that connection that reference was made to the pleas in Bullen and Leake's Precedents of Pleading in the edition which I have quoted.

I have considered the authorities cited by Mr. St. John Hutchinson, but I do not think that they really assist. It is admitted on both sides that there is no authority precisely in point; one gets close to it, no doubt, in a number of cases, but I do not think that any real assistance is derived from the consideration of authorities which are not upon the precise point to be determined. It is by reference to the earlier works on the common law, which has never been altered, that one must ascertain what is the law of the land. I cannot find that any doubt has ever been expressed upon the accuracy of the proposition of law which I have stated in the simplest language from the note in Bullen and Leake's Precedents of Pleading. I am bound to follow the law thus laid down, and, moreover, I am convinced on consideration that it is based on sound principle. I should be bound to follow it whether I was of that opinion or not, although it may well be that in some cases—as in this particular case—the law seems to operate somewhat harshly upon the defendants. But I have to bear in mind that the principle of law applicable to the facts in this case must be one of general application and cannot be modified, unless the law allows it, in order to meet the difficulties of a particular set of circumstances. The principle urged by the defendants' counsel would, in my judgment, be an encroachment upon the liberty of the subject as hitherto understood. It is true that very often there is a duty cast upon a person to put the law in motion in order to bring offenders to justice, and it is no doubt for reasons of public policy that some excuse, limited in character, is permissible in an action for damages at civil law for false imprisonment when a private person has wrongly caused the arrest of another. But be it observed that this concession is limited to felonies, and although a misdemeanour, which may

be a more serious crime than some felonies, may have been committed, yet if a person causes a wrongful arrest, however serious the misdemeanour may be, it cannot be made the basis of any legal excuse if the party has been wrongfully arrested.

When a person, instead of having recourse to legal proceedings by applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment.

In this case, although the defendants thought, and indeed it appeared that they were justified in thinking, that the plaintiff was the person who had committed the theft, it turned out in fact that they were wrong. The felony for which they gave the plaintiff into custody had not in fact been committed, and, therefore, the very basis upon which they must rest any defence of lawful excuse for the wrongful arrest of another fails them in this case. Although I am quite satisfied not only that they acted with perfect bona fides in the matter but were genuinely convinced after reasonable inquiry that they had in fact discovered the perpetrator of the crime, it now turns out that they were mistaken, and it cannot be established that the crime had been committed for which they gave the plaintiff into custody; they have failed to justify in law the arrest, and there must, therefore, be judgment for the plaintiff for the 75*l.* damages which have been awarded, with the consequent results.

It follows from what I have said that, although there is judgment for the plaintiff for this amount, the defendants have succeeded on the issue as to malicious prosecution, and having succeeded, in my judgment they are entitled to all such costs as the Master thinks were properly attributable to that issue as distinguished from the general costs of the action, and I think the costs should follow the event; the Master will have

1913

WALTERS v. W. H. SMITH & SON, LIMITED.

to rule upon it, but so far as it may be necessary I make that order.

There will therefore be judgment for the plaintiff for 75*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Ricketts & Son.*
Solicitors for defendants: *Bircham & Co.*

J. E. A.

1913
Dec. 11.

THE KING *v.* WILLIAMS AND OTHERS (JUSTICES OF SWANSEA). *Ex parte* PHILLIPS.

Crown Office—Certiorari—Rule Nisi—Sufficiency of Affidavit—Conviction—Disqualification of Magistrate—Knowledge of Facts disqualifying—Bread Act, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 15.

By s. 15 of the Bread Act, 1836, no person who shall be concerned in the business of a baker shall be capable of acting or shall be allowed to act as a justice of the peace under the Act, and if any baker shall presume so to do he shall for every such offence forfeit a penalty.

A baker was charged under s. 4 of the Act with selling bread otherwise than by weight and was convicted in presence of two justices. He obtained a rule nisi for a writ of certiorari to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the rule nisi was obtained did not state that any objection to the competence of the Court was taken at the hearing before the justices, nor did it state that at the date of that hearing the applicant was without knowledge of the facts alleged to disqualify one of the justices:—

Held, that this defect in the affidavit disentitled the applicant to the issue of a writ of certiorari ex debito justitiæ.

Held, also, on the facts, that, the granting of the writ being discretionary, the discretion should be exercised by refusing the writ.

RULE NISI for a writ of certiorari to remove into the High Court the record of the conviction hereinafter mentioned.

On May 27, 1913, James Phillips, under the name of John Phillips, was convicted for that he on May 17, 1913, at the town of Swansea in the county borough of Swansea, being a seller of

1913

REX v. WILLIAMS. PHILLIPS, *Ex parte.*

bread, unlawfully did sell to one Sophia Stacey a certain loaf of bread otherwise than by weight, to wit, for the sum of three pence for the said loaf, not being such bread as is usually sold under the denomination of French or fancy bread or rolls, against the form of the statute in such case made and provided, namely, the Bread Act, 1836 (6 & 7 Will. 4, c. 37). (1)

Sect. 15 of the Bread Act, 1836, provides that no person who shall follow or be concerned in the business of a baker shall be capable of acting or be allowed to act as a justice of the peace under the Act, and that if any baker shall presume so to do he shall be liable to a penalty as therein mentioned.

The ground on which the rule nisi was moved and granted was that David Williams, one of the justices convicting and acting, was a person concerned in the business of a baker contrary to the above enactment.

The affidavit of Margaret Phillips, the wife of the said James Phillips, stated as follows :—

"1. I am and was at the date of the matters hereinafter set forth a baker carrying on business at 46 Dan-y-craig Road Port Tennant Swansea aforesaid under the name of J. Phillips.

(1) Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 4: "All bread sold . . . . shall be sold by the several bakers or sellers of bread respectively . . . . by weight; and in case any baker or seller of bread . . . . shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct: Provided always that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

Sect. 15: "No person who shall follow or be concerned in the business of a miller, mealman, or baker shall be capable of acting or shall be allowed to act as a justice of the peace under this Act, or in putting in execution any of the powers in or by this Act granted; and if any miller, mealman, or baker shall presume so to do, he or they so offending in the premises shall for every such offence forfeit and pay the sum of one hundred pounds to any person or persons who will inform or sue for the same, to be recovered, together with full costs of suit, in any of His Majesty's Courts of Record at Westminster, by action of debt, bill, plaint, or information . . . ."

1913

REX v. WILLIAMS. PHILLIPS, *Ex parte.*

"2. On May 27, 1913, I appeared before the Bench of magistrates at the Swansea Police Court in the county borough of Swansea sitting as a Court of summary jurisdiction to answer the charge that on May 17, 1913, at the town of Swansea in the said county borough of Swansea being a seller of bread my husband the said James Phillips unlawfully did sell to one Sophia Stacey a certain loaf of bread otherwise than by weight to wit for the sum of three pence for the said loaf the said loaf not being such bread as is usually sold under the denomination of French or fancy bread or rolls contrary to the Bread Act, 1836 (6 & 7 Will. 4, c. 37). The summons was served upon me and was in the name of John Phillips and not James.

"3. On the hearing of the said summons my husband the said James Phillips was convicted under the name of John Phillips and ordered to pay the sum of five shillings and the further sum of ten shillings for costs with seven days' imprisonment in default of distress. A copy of the certificate of the said conviction is now produced and shewn to me and marked MP 1.

"4. The newspaper *South Wales Daily Post* dated May 27, 1913, now produced to me and marked A contains in the fifth column on page 3 a short report of the trial of the said case from which it appears that David Williams Esqre. who was the Mayor of Swansea sat and acted as chairman of the Court.

"5. The said David Williams Esqre. was at the time of so sitting and acting as a justice of the peace at the said hearing and conviction concerned in the business of a baker under the following circumstances, namely, the said David Williams Esqre. was president of the Swansea Co-operative Society, Limited, whose registered office is at 20 Orange Street, Swansea, as appears by a copy of the 49th quarterly report and balance sheet of the said society now produced and shewn to me and marked B. The said society is a friendly society duly registered under the Friendly Societies Act and amongst other businesses carries on a baker's business and has a bakery at Duke Street Swansea and five shops in Swansea where bread is sold. As appears from the cash account in the said report and balance sheet the said society received during the quarter ending April 5, 1913, a large sum from its bakery.

"6. A copy of the rules of the said society is now produced and shewn to me and marked MP 2 from which it appears that by rule 101 (2.) the president must be a member of the said society and by rule 102 (1a) shall take the chair if present at all meetings of the society or committee, and by rule 102 (1b) shall sign the reports to be laid before the meetings of the society. By rule 105 the president may be remunerated. It appears from the said balance sheet that considerable profits are made and shared amongst the members.

"7. I verily believe that the said David Williams Esqre. at the time of so acting was a justice of the peace aforesaid (sic) and still takes an active part in the management of the business of the said society. Further I verily believe that the said David Williams Esqre. at the time of his so acting as a justice of the peace aforesaid had and still has a pecuniary interest in the said society as a member holding one or more shares in the said society.

"8. I therefore request this Honourable Court that the said conviction be brought up and quashed. Sworn" &c.

The affidavit of William Frederick Williams stated as follows :—

"1. I am a reporter of the staff of the *South Wales Daily Post* having offices at High Street Swansea aforesaid.

"2. On May 27, 1913, I was present at the Swansea Police Court Swansea aforesaid when the summons against James Phillips for selling bread otherwise than by weight was heard and the said James Phillips was convicted.

"3. Such summons was heard before David Williams Esqre., J. W. Jones Esqre. and A. George Esqre., three of the justices of the peace for the county borough of Swansea, who sat and heard and determined the question and took part in the said conviction. The said David Williams Esqre. who was Mayor of Swansea did not stand aside during the hearing of the said summons, but sat and acted as chairman of the Court and pronounced sentence. Sworn" &c.

The affidavit of David Williams shewing cause against the rule nisi stated that he was a boiler maker by trade, from which he derived the main source of his income, and that he was only

1913

REX v. WILLIAMS. PHILLIPS, *Ex parte.*

incidentally president of the Swansea Co-operative Society and received no remuneration from the society for acting as president. As president he was merely the chairman of the committee of management. He was the holder of a transferable share of 1*l.* and owned 4*l.* 15*s.* 9*d.* withdrawable share capital in the society, upon which he received interest. As a purchasing member of the society he received dividend in respect of his purchases in the same manner as any other member. There were 1500 members, all of whom must be shareholders.

Gordon Hewart, K.C., and *A. Neilson* shewed cause. First, Mr. Williams was not a person following or concerned in the business of a baker within the meaning of s. 15 of the Bread Act, 1836. There is no substance in this objection. His connection with the business of a baker was merely nominal. His real business was that of a boiler maker.

Secondly, he took no part in the conviction. For an offence under s. 4 the defendant may be convicted before one justice of the peace. In fact the certificate of conviction in this case was signed and sealed by one ustice only, and that was not Mr. Williams.

Thirdly, a party may by his conduct before an inferior Court preclude himself from afterwards quarrelling with the decision of that Court or objecting to its jurisdiction; *Reg.* v. *South Holland Drainage Committee* (1); *Ex parte Ilchester* (*Parish*) (2); *Reg.* v. *Justices of Kent* (3); *Leeds Corporation* v. *Ryder.* (4)

The affidavit in support of the rule nisi is defective in that it omits to state either that the objection to the jurisdiction of the Court of summary jurisdiction was taken at the hearing before that Court, or that at that time the applicant and his solicitor were unaware of the facts alleged to disqualify one of the justices. On such evidence the Court will not grant the writ: *Ex parte Ilchester* (*Parish*) (2); *Reg.* v. *Justices of Kent* (3); *Leeds Corporation* v. *Ryder.* (4)

Storry Deans, in support of the rule. This is not a case where the conviction is good until it is set aside. This conviction

(1) (1838) 8 Ad. & E. 429.
(2) (1861) 25 J. P. 56.
(3) (1880) 44 J. P. 298.
(4) [1907] A. C. 420.

1913

REX v. WILLIAMS. PHILLIPS, *Ex parte.*

is absolutely void. Sect. 15 of the Bread Act, 1836, forbids under a penalty a person concerned in the business of a baker from acting as a justice of the peace under the Act. This is a disability which a party cannot waive as he might waive a disqualification for interest in the subject of the litigation or bias on the part of the magistrate. By no consent, however express, could the applicant have conferred jurisdiction upon Mr. Williams. That being so, the applicant is entitled to have the conviction quashed ex debito justitiæ.

CHANNELL J. The Court is of opinion that this rule should be discharged. No objection was taken to the jurisdiction of the Court below at the hearing before that Court; that being so, it is the rule of this Court not to grant a writ of certiorari except upon an affidavit which negatives knowledge on the part of the applicant when he was before the Court below of the facts on which he bases his objection. That rule is established on good grounds. It applies equally whether the objection is on grounds which make the act of the justices voidable or void. When objection to a conviction is taken merely by a member of the public and not by a party more particularly aggrieved the granting of a certiorari is discretionary; where the objection is by a party aggrieved, then, as a rule, the writ issues ex debito justitiæ; but a party aggrieved may by his conduct preclude himself from taking objection to the jurisdiction of an inferior Court. Statements to that effect may be found in Short and Mellor's Crown Office Practice, 2nd ed., p. 48, and in the older work of Corner on the same subject: see at p. 90. The passage in Short and Mellor is based on the authority of Blackburn J. in *Reg.* v. *Justices of Surrey.* (1) In the words of that learned judge, "Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it as in *Reg.* v. *South Holland Drainage Committee.* (2) In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as ex debito justitiæ; but where the applicant is not a party grieved (who substantially brings

(1) (1870) L. R. 5 Q. B. 466, at p. 473. (2) 8 Ad. & E. 429.

1913

REX v. WILLIAMS. PHILLIPS, *Ex parte.*

Channell J.

error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person." Therefore, if it be not the established rule that a writ will not be granted on an affidavit which does not aver absence of knowledge of facts which would disqualify the justices, at any rate this Court has a discretion whether to grant the writ or not; and in the present case any discretion which the Court has ought to be exercised by discharging the rule nisi. Upon the affidavits there appears to be some doubt as to whether one of the justices really took part in the conviction. We incline to the view that he did not take an active part, but that he remained upon the bench. Although no harm was done by his so acting, nevertheless, if the granting or refusing of this writ depended solely on the question whether this justice acted or not, the Court would probably not have thought it right to discharge the rule upon this evidence. Assuming then that he did take some part in the proceedings below, the objection taken is that he was president of the Swansea Co-operative Society, which, among a number of other concerns, did a certain amount of baking. I do not say whether that would be enough to make him a person following or concerned in the business of a baker within the meaning of s. 15 of the Bread Act, 1836; if he does follow or is concerned in the business of a baker his connection with that business is merely nominal and his interest in it infinitesimal. In such circumstances if the granting of this writ is discretionary the Court would have no hesitation in refusing it. In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ ex debito justitiæ, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justitiæ to a person who fails to state in his evidence on moving for the rule nisi that at the time of the

proceedings impugned he was unaware of the facts on which he relies to impugn them. By failing so to do a party grieved precludes himself from the right to have the writ ex debito justitiæ and reduces his position to that of one of the public having no particular interest in the matter. To such a one the granting of the writ is discretionary. In the present case the Court in the exercise of its discretion discharges the rule.

ROWLATT J. I am of the same opinion. If the applicant claims as a member of the public the answer to his application is that the writ is discretionary and should not be granted in the present circumstances. If he takes up the position of a party aggrieved, then *Reg.* v. *Justices of Surrey* (1) shews that he can by his conduct debar himself from his right ex debito justitiæ. It is a very salutary rule that a party aggrieved must either shew that he has taken his objection at the hearing below or state on his affidavit that he had no knowledge of the facts which would enable him to do so.

ATKIN J. I agree. I do not say one way or the other whether the mayor was competent to take part in this conviction. The applicant must shew that he has not precluded himself by his conduct from claiming the special relief he asks for. He has failed to shew this, and therefore the rule nisi must be discharged.

Rule discharged.

Solicitors for applicant: *Richardson, Sadlers & Callard.*

Solicitors for the justices: *Bower, Cotton & Bower, for Aston, Harwood, Somers & Entwistle, Manchester.*

(1) L. R. 5 Q. B. 466.

W. H. G.

1913
Dec. 11.

WILLS & SONS, Appellants *v.* McSHERRY and Others, Respondents.

Merchant Shipping — Seaman — Wages — Claim before Court of Summary Jurisdiction — "Order final" — Appeal — Special Case — Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 164.

By s. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879, any person aggrieved who desires to question an order or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned.

By s. 164 of the Merchant Shipping Act, 1894, a seaman may, as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a Court of summary jurisdiction as therein described, and the order made by the Court in the matter shall be final:—

Held, that, notwithstanding the former enactment, no appeal by special case lies from an order made by a Court of summary jurisdiction under the latter.

Westminster Corporation v. *Gordon Hotels* [1908] A. C. 142, followed and applied.

Whether the Court of summary jurisdiction may not give its decision subject to a special case, *quære*.

Before justices at the Southampton County Borough Petty Sessions, being a Court of summary jurisdiction, claims were made by Patrick McSherry and others, hereinafter called the respondents, under s. 164 of the Merchant Shipping Act, 1894 (1), against Charles Joseph Wills & Sons, hereinafter

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 164: "A seaman or apprentice to the sea service, or a person duly authorized on his behalf, may as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a Court of summary jurisdiction in or near the place at which his service has terminated, or at which he has been discharged, or at which any person on whom the claim is made is or resides, and the order made by the Court in the matter shall be final."

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33: "(1.) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in

called the appellants, for that the respondents were verbally promised extra wages by the appellants' servant or agent, Captain D. Bousfield, during extra time the ship Hopper No. 66, belonging to the appellants, was detained in various ports from Port Said to Southampton. The claims were heard before the justices on May 31, 1912. The justices gave judgment in favour of the respondents.

The appellants being aggrieved and dissatisfied with this determination as being erroneous in point of law applied to the justices in writing under s. 33 of the Summary Jurisdiction Act, 1879 (1), to state and sign a case setting forth the facts and grounds of their determination for the opinion of the High Court. In compliance with this application the justices stated a case in which the following facts, arguments, and grounds of decision were set forth :—

In or about February, 1912, the respondents were engaged by D. Bousfield, master of the Hopper No. 66 belonging to the appellants, at a fixed wage for the voyage from Port Said to Southampton.

The Hopper No. 66 left Port Said on February 17, 1912, but had to return to and finally left Port Said on February 27, 1912.

Captain D. Bousfield verbally promised to pay to each respondent the sum of 4*s.* for every day he was detained in port after the first twenty-four hours if he did extra work; he verbally renewed this promise during the voyage.

The Hopper No. 66 was detained during the voyage in various ports, namely, Algiers, Seville, and Lisbon, for a period amounting in all to forty-nine days.

The appellants contended (*a*) that the respondents were bound by the articles, which stipulated that they should each be paid a fixed sum for the run of the ship; (*b*) that they were not entitled to extra wages for any time the ship was detained in any port, as the parties were supposed to

---

excess of jurisdiction, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."

1913

WILLS & SONS v. MCSHERRY.

have contemplated all the accidents that seafaring is liable to; (*c*) that Captain D. Bousfield had no authority to pledge the credit of the appellants in such manner as was alleged by the respondents; (*d*) that if there was any such authority, then any agreement made in pursuance thereof ought to have been in writing; (*e*) that there was no evidence that any work was done outside the ordinary employment of the respondents; and (*f*) that the evidence shewed that the ship was seaworthy at Port Said and Lisbon, and only became unseaworthy through stress of weather.

The respondents contended that the verbal promise to pay extra wages made by Captain D. Bousfield was within the scope of his authority, and that the appellants were bound by his promise, and that the promise need not be in writing.

The justices found that the causes of the ship putting back into port were the weather experienced and the fact that the ship was not sufficiently seaworthy to face it. They were of opinion that the respondents were entitled to be paid by the appellants the sums claimed, inasmuch as while at the various ports the men did work outside the scope of their ordinary duties, as the ship was in for surveys and repairs, and they assisted in such repairs, helped in pumping out the ship, and overhauling and cleaning engines; they were further of opinion that each of the respondents was entitled to be paid by the appellants the sum of 10*s.* 6*d.* as costs per day in respect of two days; and gave judgment accordingly.

The question on which the opinion of the Court was desired was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and if not, what should be done in the premises.

The special case coming on for argument,

Rayner Goddard, for the respondents, took a preliminary objection. The justices had no power to state this case. By s. 164 of the Merchant Shipping Act, 1894, the order of the Court of summary jurisdiction is final, and no appeal lies by way of special case or otherwise. This has been decided on a statute in similar terms by the Court of Appeal and the House of Lords in *Westminster*

Corporation v. *Gordon Hotels*. (1) The state of things before the passing of the Act of 1894 is immaterial. That Act speaks from its date. In the case of seamen who have no permanent abode it is right and proper that their claims for wages should be decided with speed and without appeal. [He also referred to *Kydd* v. *Liverpool Watch Committee*. (2)]

L. F. C. Darby, for the appellants. Before the passing of the Merchant Shipping Act, 1894, there is no doubt that an appeal lay by special case, notwithstanding s. 188 of the Merchant Shipping Act, 1854, which, in terms substantially the same as those in s. 164 of the Act of 1894, provided that the order of the Court of summary jurisdiction should be final: *Reg.* v. *Bridge*. (3) The Act of 1894 was an Act to consolidate enactments relating to merchant shipping. It was never intended, by merely re-establishing a right which was subject to appeal, to confer an absolute right on one party and deprive another of his right to question it. Sect. 681 provides that the Summary Jurisdiction Acts shall, so far as applicable, apply to any proceeding under the Act before a Court of summary jurisdiction, whether connected with an offence punishable on summary conviction or not.

CHANNELL J. There is no power to state this case. Sect. 164 of the Merchant Shipping Act, 1894, enables a seaman to recover his wages before a Court of summary jurisdiction in or near the place where he is discharged. It gives him a summary tribunal in a convenient place. The questions raised on a claim for seamen's wages are usually questions of fact with which a Court of summary jurisdiction is eminently capable of dealing. The section says that "the order made by the Court in the matter shall be final." I take that to mean not merely final in the sense that the matter once having been litigated is not to be brought in question again, but final in the sense that no appeal lies from it. That seems to have been the decision of the House of Lords in *Westminster Corporation* v. *Gordon Hotels* (4), which is in point except for the contention that the Merchant Shipping

(1) [1907] 1 K. B. 910; [1908] A. C. 142

(2) [1908] A. C. 327.

(3) (1890) 24 Q. B. D. 609.

(4) [1908] A. C. 142.

1913

WILLS & SONS v. MCSHERRY.

Channell J.

Act, 1894, was in most respects a consolidating Act, and that s. 164 is substantially the same as s. 188 of the Act of 1854; that under the Act of 1854 an appeal did lie by way of special case from the order of justices, and that it is not to be supposed that the Act of 1894 abolished this right of appeal without express words to that effect. If we could take the Act of 1894 as speaking from the year 1854, then the authority of *Reg.* v. *Bridge* (1) would apply and the result would be that although between the years 1854 and 1879 there was no appeal, yet after 1879 there would be this appeal by way of special case given by the Summary Jurisdiction Act, 1879, to any person aggrieved who desires to question an order of a Court of summary jurisdiction on the ground that it is erroneous in point of law. But we cannot so deal with the Act of 1894; true, s. 164 is substantially a re-enactment of s. 188 of the Act of 1854; but the Act of 1894 deals with things existing in the year 1894; it speaks from its date. The Legislature must be taken to have known and intended the effect of the words used and to have realized that the effect would be to alter the law as it stood after the passing of the Summary Jurisdiction Act, 1879, and before the passing of the Merchant Shipping Act, 1894.

There may be a question whether all cases stated by Courts of summary jurisdiction are necessarily of the nature of appeals. In the present instance the case was stated as a proceeding on appeal. The justices had given their decision and the appropriate application was made to them requiring them to state a case by or on behalf of a person aggrieved by their decision. The circumstances are exactly those which occurred in *Westminster Corporation* v. *Gordon Hotels* (2); but in the Court of Appeal Buckley L.J. pointed out that justices may give their opinion subject to a special case on some point on which they desire direction, in which case their decision would not be final until the point so raised was decided. The learned Lord Justice said (3): "I most reluctantly agree. I am not so clear as the Master of the Rolls as to the exact bearing of *Reg.* v. *Bridge.* (1) I think there is more to be got out of it in Mr. Macmorran's favour. I hope that

(1) 24 Q. B. D. 609. (2) [1908] A. C. 142.
(3) [1907] 1 K. B. 910, at p. 915.

in this decision we are not precluding such matters as this coming up to this Court if the exact course be not taken which the special case shews was taken by the magistrate in this case. I hope that it may be possible for the magistrate instead of first making the order and then stating that, the appellants being dissatisfied with his decision, he has agreed to state a case, to say that his decision is arrived at subject to a case which he states. If that were done I think the case could be brought before this Court." I am myself strongly in favour of that view. A most useful power would be vested in magistrates if under the Summary Jurisdiction Acts they may give their decision subject to a case stated to raise points of law on which they may desire assistance, so that their decision would not be final within the meaning of s. 164 until the point had been argued before and decided by the High Court. Claims for seamen's wages may certainly involve difficult questions of law upon which petty sessions might desire to have recourse to a higher tribunal for guidance and direction. If some such procedure can be adopted the assistance of the High Court will be available.

ROWLATT J. I do not differ from the other members of the Court, but I am not clear as to the effect of s. 164. If the shipowners cannot appeal, neither can the seamen. Very difficult questions may and do arise upon claims for wages, and I hesitate to say that there is no way by which they can be brought as of right before the High Court.

ATKIN J. I agree with the judgment of Channell J. By the final decision of the Court of summary jurisdiction ascertaining the rights of the parties further proceedings in the matter are barred.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Peacock & Goddard, for C. J. Sharp, Southampton.*

W. H. G.

1914
Jan. 21, 23.

BYRNE *v.* STATIST COMPANY.

[1913 B. 2550.]

Copyright—Literary Work—Author—Advertisement—Translation from Foreign Language—Translation made for Reward—Right of Translator to Copyright—Innocent Infringer—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 5, 8.

The plaintiff, who was permanently employed on the editorial staff of a newspaper, was specially employed and paid by the proprietors of the paper to translate and summarize a speech, reported in a foreign language, for the purpose of publication as an advertisement in their paper for a foreign State, and this work was done entirely in his own time and independently of his ordinary duties. The summarized translation was published in the paper as an advertisement with the words "Translated from the Portuguese language by F. D. Byrne" printed at the end.

The defendants saw this advertisement, obtained permission from the Governor of the foreign State to publish it as an advertisement in their paper, and reproduced it verbatim. It was proved that it was the practice of newspaper managers, when they wished to publish an advertisement appearing in another paper, to ask the permission of the advertiser to do so and to act upon his instructions; but that the addition to an advertisement of such words as "translated by . . . . " was quite unprecedented:—

Held, that the translation was an "original literary work," within s. 1 of the Copyright Act, 1911, of which the plaintiff was the author; that the plaintiff was the owner of the copyright therein, within s. 5; that the defendants were not innocent infringers, within s. 8, who were not aware of, and had no reasonable ground for suspecting, the existence of copyright in the work; and that the plaintiff was entitled to damages.

Action tried before Bailhache J. without a jury.

The plaintiff claimed damages, an account, and an injunction in respect of the infringement of his copyright by the defendants. The defendants, among other defences, said that they were not aware of the existence of the copyright in the work, and had no reasonable ground for suspecting that copyright subsisted. (1)

(1) The Copyright Act, 1911 (1 & 2 Geo. 5, c. 46):—

Sect. 1: "(1.) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original

1914

BYRNE v. STATIST COMPANY.

The following statement of the facts is taken from the judgment of the learned judge.

The plaintiff is permanently employed on the editorial staff of the *Financial Times* newspaper. His regular hours are from 11 in the morning to 6 in the evening. The rest of the day is his own. He is a gentleman with an extensive knowledge of languages, including Portuguese. On April 1, 1913, the Governor of the State of Bahia, Brazil, delivered a message to the General Legislative Assembly of that State dealing with its finances. It occurred to the manager of the advertisement department of the *Financial Times*, whose attention was called to the message as published in a Bahian newspaper, that the Governor might be willing to allow that message to be printed as an advertisement in the *Financial Times*. Negotiations to that end ensued; the Governor agreed; the price was arranged and paid. The message,

---

literary, dramatic, musical, and artistic work, if—

"(*a*) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid. . . . ."

Sect. 5: "(1.) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

"Provided that— . . . .

"(*b*) where the author was in the employment of some other person under a contract or service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical. . . . ."

Sect. 8: "Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work."

1914

BYRNE v. STATIST COMPANY.

of course, appeared in the Bahian paper in the Portuguese language, and required to be translated for the *Financial Times* advertisement. The plaintiff was asked if he would undertake the translation, and what his charge would be. Two other gentlemen, unconnected with the *Financial Times*, were also asked to quote terms, and ultimately terms were made with the plaintiff, and he proceeded with the task. He did not make the translation in pursuance of any duty owed by him to the *Financial Times* as one of their staff, or in the course of his employment by them, but his employment to translate was an independent engagement quite outside his ordinary duties, and was done entirely in his own time. The plaintiff's translation was not merely mechanical. He cut down the speech by about one third. He edited it by omitting the less material parts. He divided it into suitable paragraphs, and supplied head-lines appropriate to those paragraphs. He told me too that the *Financial Times* sets a high standard of literary style and that his translation conformed to that high standard. I accept both of those latter statements upon his authority and without personal investigation. The translation so made by the plaintiff appeared as an advertisement in the *Financial Times* issue of June 27, 1913, as also did this note, "Translated from the Portuguese by F. D. Byrne." It is in respect of this translation, which runs to about 18,000 words, that the plaintiff claims copyright. The business manager of the *Statist* newspaper saw this advertisement in the *Financial Times* and communicated with the Bahian Government and obtained permission to reproduce it in the *Statist* as an advertisement at a charge of 250*l*. It was published by the *Statist* on July 5, 1913. This is the infringement complained of. It was admitted that the advertisement so reproduced by the *Statist* was in every respect a copy of that in the *Financial Times*, so that, if there was any copyright in the plaintiff, that copyright was undoubtedly infringed.

The defendants adduced evidence which proved that it is the practice of the managers of newspapers, with regard to advertisements, when they see an advertisement in another newspaper which they would like to have published in their newspapers, to apply to the advertiser or his agent for leave to print the

advertisement in their newspapers, and, upon arranging the price, upon the instructions of the advertiser or his agent to publish a verbatim copy. The witnesses for the defendant admitted, however, that the addition of such words as "translated by . . . . " were unusual and unprecedented.

H. A. McCardie, for the plaintiff. This translation was an "original literary work" within s. 1, sub-s. 1, of the Copyright Act, 1911. It is "original" because it is not a mere copy of the work of another person. Originality of idea is not necessary; it is sufficient if the work is in substance a new thing involving fresh skill and labour. This translation is "original" work in that sense, and it is "literary" work: *Sweet* v. *Benning* (1); *Wyatt* v. *Barnard* (2); *Walter* v. *Lane*. (3)

The plaintiff is the "author" of the work, and is therefore the owner of the copyright therein. This work was not made by the plaintiff "in the course of his employment" by the *Financial Times*, within sub-s. 1 (*b*) of s. 5, so as to vest the copyright in the proprietor of the newspaper; it was made under a special and independent contract. [He referred to *Dicks* v. *Yates*. (4)]

Duke, K.C., and *W. E. Hansell*, for the defendants. It is proved that in fact this translation was published as an advertisement by the *Financial Times*, and that the defendants republished it as an advertisement with the authority of the advertiser. In such circumstances no action for infringement of copyright can be brought by the composer of the advertisement: *Lamb* v. *Evans*. (5) In that case Lindley L.J. said (6): "I do see a difficulty in his having a copyright in one advertisement, because that might prevent the advertiser from republishing his advertisement in another paper, which is absurd." It cannot reasonably be said that the expression "original literary work" in sub-s. 1 of s. 1 includes an advertisement.

It may be that copyright can subsist in a translation, but sub-s. 1 (*b*) of s. 5 in such a case as this vests the copyright in

(1) (1855) 16 C. B. 459.
(2) (1814) 3 V. & B. 77.
(3) [1900] A. C. 539.
(4) (1881) 18 Ch. D. 76.
(5) [1893] 1 Ch. 218.
(6) Ibid. at p. 223.

1914

BYRNE v. STATIST COMPANY.

the person for whom the translation is made under a contract of employment, and not in the translator: *Lawrence* v. *Aflalo* (1); *Sweet* v. *Benning* (2); *Lamb* v. *Evans*. (3) That was the previous law, and sub-s. 1 (*b*) of s. 5 has the same effect.

If the copyright is vested in the plaintiff and the defendants have infringed his copyright, then they are innocent infringers and within the provisions of s. 8. The evidence as to the general practice in respect of advertisements, and the very nature of an advertisement, shew that the defendants were not aware and had no reasonable ground for suspecting that copyright subsisted in this translation. They only exercised the advertiser's right of republishing the advertisement. In such circumstances the only remedy which the plaintiff can have is an injunction, and in this case an injunction cannot be granted as there is no probability of the defendants again publishing this translation.

McCardie in reply. There can be copyright in an advertisement if it is an "original literary work." The decision in *Lamb* v. *Evans* (3) was based upon the assumption that the advertiser was the owner of the copyright in the advertisement. That is not so under the present Act. The only way in which the copyright, in such a case as this, can be vested in a person other than the actual author is under sub-s. 1 (*b*) of s. 5, or by assignment under sub-s. 2.

Sect. 8 does not apply to this case. It only applies where the infringer is not aware that any copyright subsists at all, and the defendants simply made a mistake of law in supposing that the copyright was vested in the advertiser. It was obvious that copyright must subsist, and it was immaterial in whom it was vested. After seeing the statement that the plaintiff was the translator, the defendants could not say they had no reasonable grounds for suspecting that copyright subsisted.

Jan. 23. BAILHACHE J. (4) In this case the plaintiff sues in respect of an alleged infringement of copyright under the following circumstances. [The learned judge stated the facts and

(1) [1904] A. C. 17.
(2) 16 C. B. 459.
(3) [1893] 1 Ch. 218.
(4) The judgment was written.

proceeded :] To ascertain whether the plaintiff had the copyright he claims, one must turn to the Copyright Act, 1911. By s. 1 copyright subsists in every original work first published in England, and by s. 5 the author of a work shall be the owner of the first copyright therein.

No question arises about publication. The plaintiff's translation was first published in England. The remaining questions upon these sections are: Was the plaintiff's translation an original literary work? and was the plaintiff the author of it? These are questions of fact. The translation was, I think, certainly a literary work. Was it original and was the plaintiff the author? These are, I think, in effect but one question. 'I think the words "original literary work" mean a literary work of which the person in whom the copyright is laid, or through whom the title to the copyright is traced, is the author. A translator of a literary work has for many years been held to be the author of his translation, and the House of Lords, in *Walter* v. *Lane* (1), went so far as to hold that a shorthand writer who reported a speech verbatim was the author of his report. I answer these questions, therefore, in the plaintiff's favour.

But the defendants took two other points to which I must refer. They relied upon s. 5, sub-s. 1 (*b*), and said truly enough that the plaintiff was in the service of the *Financial Times* under a contract of service, and then went on to say that the work was made by the plaintiff in the course of his employment, and that, therefore, by virtue of s. 5, sub-s. 1 (*b*), the copyright, if any, was in the *Financial Times*. I have already, in my statement of the facts, anticipated this point, and upon the facts as found by me this point fails.

The defendants' last point was founded on s. 8. That section provides that no damages shall be recoverable for infringement of copyright if the defendant alleges that he was not aware of the existence of the copyright in the work and proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

(1) [1900] A. C. 539.

1914

BYRNE v. STATIST COMPANY.

Bailhache J.

It was upon this point that the defendants most strongly relied. The translation was, as I have said, published by the *Financial Times* as an advertisement, and the defendants satisfied me that the practice of the managers of newspapers with regard to advertisements is that, when they see an advertisement in another paper which they would like to have the profit of publishing, they apply to the advertiser or his agent for leave to print the advertisement in their papers, and upon arranging the price they do, upon the instructions of the advertiser or his agent, print a verbatim copy of such advertisement, apparently relying upon the supposition, which is no doubt usually well founded, either that there is no copyright in the advertisement or that such copyright belongs to the advertiser.

The defendants suggested that they had no reasonable ground to suspect that there was any copyright in the advertisement at all; but the advertisement contained upon its face an intimation that it was translated by the plaintiff. The defendants' witnesses admitted that that was an unusual and unprecedented fact, but stated that it was one to which they, as men of experience, attached no importance. In that I think they were wrong, and I find as a fact that there was reasonable ground to suspect that there was copyright in the plaintiff's translation. The position of the defendants in fact was not so much that they did not suspect the translation was copyright as that they supposed that the copyright was in the Governor of Bahia, whose instructions for its reproduction they had obtained. This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed. It is this latter state of mind that s. 8 requires to be proved, and s. 8 is no protection to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner. This last point, therefore, also fails the defendants, and there must be judgment for the plaintiff. This is not a case for injunction. The translation has served its purpose and will not be republished, at any rate by the defendants. The plaintiff did not press for

an account, and both parties left the damages to me. I assess them at 150*l*. The plaintiff will have the costs of the action.

1914

BYRNE v. STATIST COMPANY.

Judgment for plaintiff.

Solicitors for plaintiff: *Michael Abrahams, Sons & Co.*
Solicitors for defendants: *Goldberg, Barrett & Newall.*

J. H. W.

NORTH *v.* WOOD.

1914

Jan. 23.

Savage Dog—Dog kept by Daughter in Father's House—Liability of Father for Injuries inflicted by it.

A father allowed his daughter, aged seventeen, who resided with him, to keep in his house a dog which he knew to be savage. The dog was her property, and she paid for its food and licence out of her earnings. While so kept there it attacked and killed a valuable dog belonging to a third person:—

Held that, as the daughter was of a sufficient age to allow of her exercising control over her dog, her father was not responsible for the damage done.

APPEAL from the Lichfield County Court.

The defendant kept a tobacconist's shop, and his daughter Dorothy Wood, aged seventeen, lived with him and assisted him in the shop, and was paid wages by him for her assistance. By his permission Miss Wood kept on the premises a bull terrier, which was known to him to be savage. The dog was Miss Wood's property, having been given to her by a friend, and she paid for its food and licence out of her earnings. On May 31, 1913, Miss North, the plaintiff, was passing the door of the defendant's shop, leading a Pomeranian puppy, when the bull terrier flew at the puppy and bit it so severely that it shortly afterwards died. The puppy, which was a bitch nine months old, was a valuable one, having recently taken a first prize at a Birmingham dog show. Miss Wood's bull terrier appeared to have a peculiar antipathy to Pomeranian dogs, having on two previous occasions savagely attacked dogs of that breed belonging to different owners, which facts were known to the defendant. Under these circumstances the plaintiff

1914

NORTH v. WOOD.

sued the defendant for the loss of her puppy. The county court judge was of opinion that if the defendant's daughter, who was the owner of the dog, had been of tender years so as to be unable to exercise control over it, the defendant would by permitting it to live on his premises have rendered himself liable for any damage done by it, but that as she had arrived at years of discretion and was quite competent to control it she and she alone was responsible for the keeping of it. He accordingly gave judgment for the defendant. The plaintiff appealed.

Drysdale Woodcock, for the plaintiff. The county court judge was wrong in assuming that because the daughter was of a sufficient age to be liable as the keeper of the dog her liability excluded that of her father. There is no reason why they should not both be liable. She was liable as the owner of the dog, and he was liable as the occupier of the premises on which he allowed it to be kept, and from which he had the power to order its removal. A person who permits premises of which he is himself in occupation to be used by another for the commission of a nuisance is responsible for any damage resulting therefrom, even though the nuisance be not committed for his benefit; and the keeping of a savage dog upon premises is a nuisance for this purpose. That was the ground of the decision in *McKone* v. *Wood*. (1) There a dog which belonged, not to the defendant, but to a former servant of his who had left his employment, and was allowed by the defendant to resort to his premises, bit the plaintiff, and the defendant was held liable. Lord Tenterden C.J. said: "It is not material whether the defendant was the owner of the dog or not; if he kept it that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty either to have destroyed the dog or to have sent him away as soon as he found he was mischievous." There as here there was another known person who was liable as the owner of the dog, and yet the occupier of the premises was held liable also. If it was the duty of the occupier in that case to destroy or send away the dog it

(1) (1831) 5 C. & P. 1.

was equally the defendant's duty here. If performing lions were exhibited at a music hall and one of them escaped it would be no answer to an action against the lessee of the hall to say that the lions belonged to the lion tamer; they would both be liable.

McCardie, for the defendant, was not called upon.

RIDLEY J. In this case I think the county court judge was right. It is quite true that there may be circumstances under which a person who is not the owner of a dog may be bound to exercise control over it and will be responsible if it bites somebody. Such circumstances existed in the case cited of *McKone* v. *Wood* (1), where the defendant, who, although not the owner, treated the dog as if it was his, was held liable because there was no one else on the spot who could exercise control over it. But in the case before us the defendant's daughter who was the owner of the dog was living on the premises and, as the judge has found, had the control of it. Under those circumstances she was the person liable, and not the defendant.

BANKES J. I agree. I think the judge directed himself rightly, and that the question as to who had the control of the dog was one of fact. The judge's decision upon that question we could not disturb even if we disagreed with it, which we do not.

Appeal dismissed.

Solicitors for plaintiff: *Ullithorne, Currey & Co., for Birch & Birch, Lichfield.*

Solicitors for defendant: *Ward, Bowie & Co., for Addison & Cooper, Walsall.*

(1) 5 C. & P. 1.

J. F. C.

1913
Nov. 21, 22, 25.

BERRY *v.* FARROW and Another.

[1913 B. 642.]

Revenue—Income Tax—Schedule E—Additional Assessment—Notice—Demand for Payment—"Usual or last known place of abode"—Company—Managing Director—Company's Office—Taxes Management Act, 1880 (43 & 44 *Vict. c.* 19), *s.* 16 (*e*).

Sect. 16 (*e*) of the Taxes Management Act, 1880, provides that "all notices or forms required or allowed to be served on any person may be either delivered to such person or left at the usual or last known place of abode of such person."

The plaintiff was the manager of a limited company the registered office of which was in the city of London. The company did no business and the plaintiff only attended at the company's office on rare occasions. The Commissioners of Income Tax for the city of London made an additional assessment under Sched. E of the Income Tax Acts upon the plaintiff in respect of the salary paid to him as manager of the company. Notice of the assessment and a written demand for payment were left at the company's office, but were not received by, and did not come to the knowledge, of the plaintiff. The plaintiff not having paid the tax, a distress was levied in respect thereof at his dwelling-house:—

Held, that under the Income Tax Act, 1842, and the Taxes Management Act, 1880, notice of an additional assessment and a demand for payment must be given to the person sought to be charged; that the company's office was not the plaintiff's "usual or last known place of abode" within s. 16 (*e*) of the Taxes Management Act, 1880, and that, therefore, no valid assessment had been made upon the plaintiff, and the distress was wrongful.

Action tried by Bankes J. without a jury.

The plaintiff claimed damages for wrongful distress. The defendant Farrow was a collector of income tax and the defendant Searcy was a certificated bailiff. On January 23, 1913, the defendants entered the plaintiff's residence at Wealdstone, in the county of Middlesex, and distrained upon the plaintiff's goods for the sum of 8*l.* 15*s.* alleged to be due and owing by the plaintiff in respect of income tax.

The defendants by their defence justified the distress on the ground that by an additional assessment made on April 4, 1912, under Sched. E of the Income Tax Acts the Commissioners of Income Tax for the city of London assessed the plaintiff

1913

BERRY v. FARROW.

for the financial year 1911-12 as manager of Berry's Motor Non-Skid Company, Limited, a company carrying on business at 32, Gresham Street, in the city of London, to an amount of 17*l.* 10*s.* income tax on an assessed sum of 300*l.*, being duty at the rate of 1*s.* 2*d.* in the pound for the said financial year; that notice of the assessment and demand for payment had been duly served on the plaintiff by delivery thereof at 32, Gresham Street, and, in the case of the final demand, on January 14, 1913, at the plaintiff's residence at Wealdstone; that the Commissioners of Offices for the city of London by certificate dated January 1, 1913, certified to the Commissioners of Income Tax of the Gore Division of Middlesex (in which division the plaintiff's residence was situated) that the plaintiff had been assessed as aforesaid, and that there was then due and owing from the plaintiff in respect of the duties so charged the sum of 8*l.* 15*s.*, and the said Commissioners did request the Gore Commissioners to raise and levy the said sum of 8*l.* 15*s.* according to law, and that the distress was duly levied in pursuance of the said request.

The plaintiff by his reply raised the following contentions:— That the additional assessment was not made according to law; that the delivery of the notices and demands for payment at 32, Gresham Street was not a service on the plaintiff in accordance with the provisions of the Taxes Management Act, 1880; that the sum of 8*l.* 15*s.* was not part of the additional assessment, and that the plaintiff had never been assessed to the amount of 8*l.* 15*s.*

The facts of the case and the arguments are fully set out in the judgment.

J. B. Matthews, K.C., and *Reginald White*, for the plaintiff.

Dickens, K.C., and *A. M. Latter*, for the defendants.

The following cases were referred to:—*Attorney-General* v. *M'Lean* (1); *Reg.* v. *Justices of County Tyrone* (2); *Blackwell* v. *England* (3); *Rex* v. *Gillespie*. (4)

Cur. adv. vult.

(1) (1863) 1 H. & C. 750.
(2) [1901] 2 I. R. 497.
(3) (1857) 8 E. & B. 541.
(4) [1904] 1 K. B. 174.

1913

BERRY v. FARROW.

1913. Nov. 25. BANKES J. read the following judgment:—In this case the plaintiff claims damages for an alleged wrongful distress levied by a collector of income tax in the plaintiff's house Abberley, Headstone Drive, Wealdstone, in the county of Middlesex. The plaintiff is an engineer, who had taken out a patent for a non-skid motor device. He had assigned his patent to a limited company whose service he entered as manager at a salary of 300*l.* per annum. The company's registered office was at one time at 8, Queen Street, in the city of London, but in March, 1911, the office was removed to the offices of the solicitors of the company at 32, Gresham Street. The company had done no business, and after the first years of its existence the plaintiff had never received his full salary. In the years 1910 and 1911, and down to the month of March, 1912, the plaintiff had lived at 49, Roxborough Road, Harrow, and he had made a return for income tax under Sched. D for the years 1909-10 and 1910-11 from that address. The plaintiff had no income beyond the salary he received from the company, and after claiming certain exemptions the income tax due from him for each of those years was 4*l.* 2*s.* 6*d.*, which sum was duly paid.

On January 11, 1911, a demand note was delivered at 8, Queen Street, claiming from the plaintiff for the year 1910-11 17*l.* 10*s.* income tax under Sched. E as managing director of the company. The plaintiff took no notice of the demand and nothing was done under it. In June, 1911, the plaintiff received from the assessor of taxes at Harrow a form addressed to 49, Roxborough Road, Harrow, requiring him to make a return of his income under Sched. D for the year 1911-12. This the plaintiff did giving his private address as 49, Roxborough Road, Harrow, stating that he had no business address, and returning his total income at 300*l.* derived from his employment as manager of the Berry's Motor Non-Skid Company, 32, Gresham Street, E.C., and claiming abatement of 160*l.* This return was dated and sent off on June 14, 1911. On March 12, 1912, the plaintiff moved from Roxborough Road to Abberley, Headstone Drive, Wealdstone. From June, 1911, to January, 1913, the plaintiff heard nothing of any demand for income tax, and I accept the plaintiff's statement that no notice of any assessment or demand

for payment in fact reached him. On January 14, 1913, the defendant Farrow called at the plaintiff's house at Wealdstone and produced a final demand and notice requiring the plaintiff to pay 8*l.* 15*s.* income tax assessed upon him at 32, Gresham Street, as manager of Berry's Motor Non-Skid Company, Limited, for the year 1911-12. This amount the plaintiff refused to pay upon the ground that he was not liable for that amount. The defendant Farrow recommended the plaintiff to see the surveyor of taxes in the City on the matter, and this the plaintiff did, and he was told the matter would be taken up with the authorities at Willesden. The plaintiff heard nothing more until January 22, when the defendant Farrow again called with a certificated bailiff and informed the plaintiff that unless he paid the amount claimed he would have to place a man in possession. As the plaintiff still refused to pay, an arrangement was come to that the man should retain "walking possession" instead of remaining on the premises. The plaintiff on the next day went again to the surveyor of taxes, and from him to Somerset House, and from there to the Chancellor of the Exchequer to endeavour to get the distress withdrawn, but without success.

On January 25 the authorities at Willesden wired to the defendant Farrow to stay proceedings and return papers. Upon this the plaintiff and the defendant Farrow had an interview. The plaintiff had not any accurate recollection of what occurred, and taking all the circumstances into consideration I am satisfied that the defendant Farrow did not either abandon or withdraw the distress. On January 28 the bailiff called on the plaintiff and told him that, as the five days covered by the first arrangement were expiring, he must sign a fresh document if he desired the "walking possession" to continue. This the plaintiff did. Two days later the defendant Farrow told the plaintiff that he had orders to collect the money, and thereupon the plaintiff on January 31 paid the defendant Farrow the 8*l.* 15*s.* and 1*l.* 8*s.*, the expenses of the distress.

It is under these circumstances that the plaintiff brings this action, and on his behalf it was contended: (1.) that no valid assessment had ever been made upon the plaintiff for the year in question and consequently that no proceedings to recover the

1913

BERRY v. FARROW.

Bankes J.

amount claimed could be lawfully taken; (2.) that even if a valid assessment had been made it had been altered without lawful authority and that the proceedings to recover the amount claimed were taken under the altered assessment and consequently were unlawful also; (3.) that the distress levied on January 22 had been withdrawn and abandoned on January 25 and that all subsequent proceedings to recover the amount claimed were unlawful; (4.) that the notice of distress was bad in form. I can dispose of the last three points in a few words, because the assessment was not in fact altered, and I find that the distress was not abandoned or withdrawn, and in my opinion the defect in form of the notice of the distress (if defect it be) does not give the plaintiff any cause of action.

The plaintiff's first contention is one which raises questions of some difficulty on the construction of the Income Tax Act, 1842, and the Taxes Management Act, 1880. The question for decision is whether these statutes require notice of assessment and demand to be given to the person charged, and, if they do, what constitutes a proper service of such notices. For the defendants it was contended that the proceedings had been regular throughout, and from the evidence given by the defendants I find that the following was the course of these proceedings. In the year in question, 1911-12, the first assessment for Sched. E for the parish of Cheap was made by the Commissioners on July 7, 1911. The names of Berry's Motor Non-Skid Company, Limited, and of the plaintiff as its manager were inserted in that assessment, but no assessment was made as the company was found to have moved from 8, Queen Street. In pursuance of a certificate of the surveyor of taxes dated April 1, 1912, the Commissioners made an additional first assessment for the parish which was signed on April 4 in that year. In this additional first assessment the plaintiff is assessed as manager of the company at 300*l.* and the duty payable at 17*l.* 10*s.* Notice of this assessment dated May 31, 1912, was sent by post or delivered at 32, Gresham Street, the then offices of the company. A first and second demand for payment of the said sum of 17*l.* 10*s.* dated respectively June 25 and July 5 were similarly sent or delivered at the same place. In June the attention of the

1913

BERRY v. FARROW.

Bankes J.

solicitor who acted as secretary of the company and in whose offices the company was then housed was called to the fact that no return had been made by him as required by the Income Tax Acts of the names and addresses of the persons employed by the company and of the payments made to those persons by the company. In compliance with that notice the secretary on August 2, 1912, wrote a letter to the collector stating that the only official of the company who had received any payment was the plaintiff, giving his address as Abberley, Headstone Drive, Wealdstone, and stating that between April 5, 1911, and April 5, 1912, he had received a sum of 150*l.* 2*s.* 11*d.* At the same time the secretary returned unopened the notices which had been left at his office for the plaintiff. As the result of this information communications passed between the surveyor of taxes, the collector, and the Commissioners into which I think it is not necessary to enter, but which resulted in the issue of a certificate by the Commissioners of the city of London, dated January 1, 1913, directed to the Commissioners of the division of Gore, requesting them to levy the sum of 8*l.* 15*s.*, being income tax upon an amount of 150*l.*, instead of upon the full assessment of 300*l.* Acting upon the certificate the Commissioners of Gore on January 9 directed the defendant Farrow to demand payment of the said sum and if necessary to distrain for the same. It was under this direction that the defendant made the distress complained of. The only other fact to which I need refer is the fact that the plaintiff very rarely attended at the offices of the company. He put the number of calls at once in three months; the secretary stated he thought they would be about eight times a year. As already stated, none of the notices sent to the office of the company ever reached the plaintiff.

I now come to a consideration of the statutes in order to deal with the contention on the one side and the other as to the validity or otherwise of the defendants' proceedings. The authorities were, in my opinion, right in assessing the plaintiff under Sched. E and not under Sched. D, and they were also right in assessing him at the offices of the company by which he was employed, and not at his home at Wealdstone. Their action in this respect followed the express directions of s. 147 of the

1913

BERRY v. FARROW.

Bankes J.

Income Tax Act, 1842. I do not agree with the contention put forward on behalf of the defendants that no notice of the assessment made upon him need have been given to the plaintiff. In my opinion the statute requires a notice. The additional first assessment of April 4, 1912, was made under the power conferred by s. 52 of the Taxes Management Act, 1880. This section treats the additional first assessment as a rectification of the original first assessment, and it provides that it is to be "subject to appeal and other proceedings as authorised in the case of the first assessment." Apart from anything else the right of appeal in my opinion implies the giving of a notice of assessment to the party charged, and I find the giving of such a notice assumed in s. 55 and s. 57, sub-s. 3, of the same statute; but apart from this, s. 57, sub-s. 1, of this Act provides that, "so soon as any assessment" "shall be signed and allowed, notice of appeal meetings shall be given as prescribed by the Income Tax Act, 1842." This sub-section, in my opinion, applies to an additional first assessment as well as to the original first assessment. Turning now to the Income Tax Act, 1842, the section dealing with the notice of appeal meetings is s. 80. This requires the Commissioners, as soon as the assessments for any parish or place under Scheds. A or B have been allowed and signed, to cause notice of that fact and of the day for hearing appeals "to be given in such manner as they shall judge expedient," and it provides for the giving, at the option of the Commissioners, either of a general public notice or for the "delivering to each party charged the amount of his assessment, together with a note of the day of appeal." The provisions of this section are, I think, extended to an assessment under Sched. E by the provisions of s. 188 of the same statute. Mr. Dickens contended that an additional first assessment did not come within these sections, but with this contention I do not agree. The public notice indicated in the section was not given in this case, nor was notice delivered to the party charged. It was, however, contended by Mr. Dickens, and not disputed by Mr. Matthews, that s. 16 of the Act of 1880 extended the powers of the Commissioners with regard to the service of notices, and that in pursuance of sub-s. (*e*) of that section the notice might be served either by

delivery upon the person to be charged or by leaving the same at his "usual or last known place of abode." The only service in the present case was at 32, Gresham Street, the office of the Berry's Motor Non-Skid Company, and it was contended for the defendants that this office was for the purpose of these statutes to be treated as the plaintiff's usual place of abode. The expression "place of abode" was not, so far as I can see, used in the Income Tax Act, 1842, but I was referred to a number of sections in which the expressions "dwelling-house," "place of residence," "residence," "ordinary residence," place where "the business is exercised" are used. I do not think that a consideration of the provisions of those sections is of much assistance except as indicating that the Act contemplates that a person may for the purposes of the Act have more than one residence. The question I have to decide is what, having regard to the scope and intent of the Act, is the meaning of the expression "usual or last known place of abode" as used in s. 16? It is, I think, clear that the object of the notice is to give the person charged an opportunity of challenging the correctness of the assessment by appealing against it, and a construction should therefore be adopted which would include some place at which the notice would be likely to be brought to his attention. I cannot lay down a rule of construction which shall be applicable to all companies and all company officials. What I have to decide is whether, at the time the notice of assessment was delivered, 32, Gresham Street was the usual or last known place of abode of the plaintiff. The question must be one of mixed fact and law, and upon the facts of this case I cannot come to the conclusion that 32, Gresham Street was in any real sense the plaintiff's place of abode, either from the business or domestic point of view. Mr. Dickens has, however, contended that in assessments under Sched. E it is the office, rather than the man who holds the office, which is assessed, and that in the case of the manager of a company he must be taken to have a statutory abode at the office of the company by which he is employed. I cannot find any sufficient support for this argument in the statutes, and I cannot, therefore, accept it. I decide, therefore, in favour of the plaintiff that 32, Gresham Street was not his usual or last known place of abode.

1913

BERRY v. FARROW.

Bankes J

Mr. Latter contended that the conclusion to which I have come would render the Act unworkable because of the provisions of s. 46 of the Income Tax Act, 1842, which limit the power of assessors of serving notices to a service within their respective districts. I think that there are several answers to this contention. In the first place, I see no reason why the assessors in one district should not serve notices which are sent to them for service from another district, just as taxes assessed in one district are collected in another. In the second place, if the construction of the statute of 1880 is adopted which applies s. 16 to a notice of assessment under the Act of 1842, then the procedure there laid down supersedes the provisions of the Act of 1842 and gets rid of the suggested difficulty. In the third place, I see no reason why the Commissioners, while adhering to their present practice of serving notices at the office of a company which would continue to every one any advantage he may have from that practice, should not put themselves in a position to enforce their assessments by adopting the method of the public notice indicated in s. 80 of the Income Tax Act, 1842. If this course is possible it would become immaterial whether the office of the company was the abode of its officers or not.

For the reasons which I have given I must hold that no valid assessment was made upon the plaintiff for the year in question, and that the proceedings taken to recover the amount assessed were unlawful, and I give judgment for the plaintiff for the agreed damages and costs.

Judgment for plaintiff.

Solicitor for plaintiff: *Julius A. White.*

Solicitors for defendants: *Andrew Walsh, Gray & Rose.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1913
Dec. 4, 5, 19.

MARQUIS CAMDEN *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Reversion Duty—Determination of Lease—"Benefit accruing to the lessor"—Basis of Ascertainment—Building Agreement—Expenditure on Building by Lessee—"Payments made in consideration of the lease"—"Nominal rent"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13 *—Statute—Construction—Evidence—Admissibility.*

In 1891 W. agreed with the trustees of the C. estates to take a lease for forty years of a block of houses at a yearly rent of 125*l.*, but no lease was to be granted until W. had completed certain specified building operations upon the property. The works were completed at a cost of 6000*l.* and the lease was granted "in consideration of the expenses incurred by the lessee" in carrying out the works and of the rent and covenants reserved by the lease. In 1910 the lease was surrendered, and thereupon a claim for reversion duty arose under s. 13 of the Finance (1909-10) Act, 1910, which provides, by sub-s. 1, that on the determination of any lease of land, reversion duty shall be paid upon the value of "the benefit accruing to the lessor."

By sub-s. 2, that benefit is to be deemed to be the amount by which the total value of the land at the time the lease determines exceeds the total value of the land at the time of the original grant of the lease, "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)":—

Held by the Court of Appeal, reversing the decision of Horridge J., that in assessing the reversion duty the total value of the land at the time of the original grant of the lease was not to be ascertained solely by capitalizing the rent, but that the sum of 6000*l.* expended by W. was a payment "made in consideration of the lease" within the meaning of the section, and must be taken into account.

Decision of Horridge J. on this point in *Stepney and Bow Educational Foundation (Governors)* v. *Inland Revenue Commissioners* [1913] 3 K. B. 570, overruled.

Per Phillimore L.J.: The words "nominal rent" in this section mean "a rent which suffices to express the relation of landlord and tenant, but gives no measure of value."

Whether the rent in this case was a "nominal rent" within the section, *quære.*

Expert evidence as to the meaning of ordinary English words in a modern Act of Parliament of general application is not admissible.

THIS was an appeal from a decision of Horridge J. raising the same question as that which arose in *Stepney and Bow*

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Educational Foundation (Governors) v. *Inland Revenue Commissioners* (1), namely, whether, in ascertaining the total value of land comprised in a lease at the time of the original grant thereof, sums expended by the lessee in pursuance of an agreement to execute specified building works on the land, in part consideration of which the lease was granted, ought to be taken into account for the purpose of assessing the lessor to reversion duty under s. 13 of the Finance (1909-10) Act, 1910 (2), upon the determination of the lease.

Horridge J. held, following his previous decision in the above-mentioned case, that such sums ought not to be taken into account.

From this decision the subject (the Marquis Camden) appealed.

In the present case the facts were as follows. By an agreement dated June 6, 1889, and made between the trustees of the will of the second Marquis Camden and William Henry Wilson, the trustees agreed to grant and Wilson agreed to take a lease of certain land and houses at Camden Town for twenty-one years as to part and twenty years as to the rest, at yearly rents amounting in the whole to 125*l.*, Wilson undertaking to carry out certain building works specified in a schedule to the agreement within eighteen months, and the lease, which was not to be granted until the works were executed, was to be in the form used on the Camden Town estate. By a further agreement, dated

(1) [1913] 3 K. B. 570.

(2) By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease, a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Sub-s. 2: "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation) of the land at the time the lease determines . . . . exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)."

February 17, 1891, the agreement of June 6, 1889, was modified, the terms of the leases being extended to forty years and thirty-nine years respectively. The reason for this extension of the terms of the leases was that it was found that Wilson, in order to fulfil his undertaking, had to spend a larger sum than was originally contemplated. The amount which he in fact expended was found by Horridge J. to be 6000*l.*

In pursuance of the above-mentioned agreements six leases were ultimately granted to Wilson for terms of forty years and thirty-nine years respectively at rents amounting in the whole to 125*l.* Each indenture of lease contained a recital "that the demise is made in consideration of the expenses incurred by the lessee in adding to improving and repairing the messuages and buildings hereby demised and of the rents and covenants on the part of the lessee hereinafter reserved and contained."

The six leases were determined by surrender in 1910 and fresh leases agreed to be granted. Thereupon reversion duty became payable by the present Marquis. For the purposes of this case it was agreed that the amount expended by Wilson in executing the specified works was 6000*l.* In assessing the amount of the duty payable by the Marquis the Commissioners fixed the total value of the land at the time of the original grant of the lease at 3125*l.*, that being the rent of 125*l.* capitalized at twenty-five years' purchase, and took no account of the 6000*l.*, which they contended was not a "payment made in consideration of the lease" within s. 13, sub-s. 2. It was further agreed that the value of the property at the time the leases were determined was 11,246*l.*, so that the amount on which the duty was to be levied was, according to the contention of the Commissioners, 8121*l.* That contention was adopted by the referee, whose decision was affirmed by Horridge J.

It was further held by Horridge J. that the rent reserved by the leases was not a "nominal" rent within the meaning of s. 13, sub-s. 2, and consequently that the words within brackets at the end of that sub-section did not apply to this case.

Upon that point there was evidence that 125*l.* was not a fair rental value even for the site as bare land apart from the buildings upon it; that the site was worth 600*l.* a year to let on a

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

ninety-nine years' building lease; and that after the scheduled building operations had been carried out by Wilson at an expenditure of 6000*l.*, the rack rental, after deducting rates, taxes, repairs, and all outgoings except ground rent, amounted to 811*l.* a year.

Danckwerts, K.C., and *W. Allen*, for the appellant. The duty which is to be charged under s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, is to be levied upon the value of the benefit accruing to the lessor by reason of the determination of the lease, and what has to be arrived at is the total value of the land at two periods, namely, (1.) at the time the lease determines, and (2.) at the time of the original grant of the lease. It must be taken that at the time of the passing of the Act the Legislature had knowledge of the fact that a considerable portion of the land in this country is let on building leases, so that mere capitalization of the rent reserved would not give the total value. Where the landlord gets a premium upon the granting of a lease, that must be taken into account in ascertaining the total value. It is submitted that where the rent reserved is anything materially less than the best rent that can be obtained in the market, that is a "nominal" rent within the meaning of s. 13, and that the rent reserved in this case was a "nominal rent." The basis on which the total value is to be ascertained is "the rent reserved and payments made in consideration of the lease," i.e., in this case, the rent of 125*l.* and the 6000*l.* expended upon the property by Wilson, the lessee. The 6000*l.* was clearly a payment "made in consideration of the lease." Sect. 32 of the Act supports this contention.

[SWINFEN EADY L.J. If the same thing were done in another way, namely, if the landlord were to execute the work and the tenant were to pay the 6000*l.* to him, that would clearly be a payment made in consideration of the lease.]

Yes. It cannot depend upon the mere form of the transaction. [*Maillard* v. *Duke of Argyle* (1) and *Turney* v. *Dodwell* (2) were also referred to.]

Alternatively it is submitted that the case comes within that

(1) (1843) 6 Man. & G. 40. (2) (1854) 3 E. & B. 136.

part of s. 13, sub-s. 2, which is enclosed in brackets: "(including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)."

Upon that point an application in the Court below to adduce evidence as to the meaning of the expression "nominal rent," was rejected. Such evidence is admissible.

In *River Wear Commissioners* v. *Atkinson* (1) Lord Blackburn said: In construing a document "in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used." That was approved by Lord Halsbury in *Butterley Co.* v. *New Hucknall Colliery Co.* (2)

The appellant wishes to prove that the words "nominal rent" have in the profession of land surveyors a particular meaning, namely, "a rent not intended to represent the true rental value." If that is established it is for the Court to say whether the words have that meaning in this Act.

The principle contended for is stated by Parke B. in *Shore* v. *Wilson*. (3) That applies as well to statutes as to all written instruments. It is competent to the Court to take evidence as to the meaning of a particular phrase. If it has a special meaning the Court will inform itself as to what that meaning is. An Act of Parliament is but a written instrument.

In *Robertson* v. *Jackson* (4) the words were "in turn to deliver." Those words had a special significance in Algiers and evidence was admitted to prove what it was. See also *Curtis* v. *Peek* (5) and *Clayton* v. *Gregson* (6), where the word in question was an ordinary English word with a special meaning.

(1) (1877) 2 App. Cas. 743, at p. 763.
(2) [1910] A. C. 381, at p. 382.
(3) (1842) 9 Cl. & F. 355, at p. 555.
(4) (1845) 2 C. B. 412.
(5) (1864) 13 W. R. 230.
(6) (1836) 5 Ad. & E. 302.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

The language of a statute is not always to be construed in its popular sense. In *Pemsell's Case* (1) Lord Macnaghten said: "In construing Acts of Parliament, it is a general rule, ... that words must be taken in their legal sense unless a contrary intention appears." Here the Court is bound to inform itself in this respect. Not to do so would be to fail in carrying out the intention of the Legislature.

Sir John Simon, A.-G., and *Sheldon*, for the Crown, upon the question of evidence. Whatever may be the rule as to the construction of private documents it is the duty of the Court to construe English words in Acts of Parliament. There is no reported case where evidence has been admitted to inform the Court as to the meaning of words used in a statute. It is the duty of the Court in construing a statute to give the words their ordinary signification, unless when so applied they produce an inconsistency or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification. See Lord Blackburn's speech in the *River Wear Case* (2), where, citing from *Heydon's Case* (3), he specifies four points upon the construction of Acts of Parliament. None of them give colour to the notion that evidence may be adduced in such a case as this.

The expression "nominal rent" occurs also in the Conveyancing and Law of Property Act, 1881, s. 18, and in the Settled Land Act, 1882, s. 8, sub-s. 2, and s. 65.

[PHILLIMORE L.J. Literary evidence may be called in aid.]

Yes, that is the distinction. It is used by way of illustration. To do what is sought for here would be a novel extension of the functions of evidence. The Court must inform itself by inquiry rather than by evidence.

Danckwerts, K.C., in reply. Calling in aid the use of the words in other statutes is nothing less than adducing evidence. The appellant does not desire to prove the ordinary everyday meaning of the word "nominal," but that in a particular profession the word has in this connection a special signification. The reason there is no reported case is that the proposition is

(1) [1891] A. C. 580. (2) 2 App. Cas. 743, at p. 763.
(3) (1584) 3 Rep. 7b.

too well established. [He also referred to *Read* v. *Bishop of Lincoln*. (1)]

[*Sir J. Simon, A.-G.*, also referred to what was said by Lord Esher in *Sharpe* v. *Wakefield* (2), and to Craies on Statute Law, p. 88.]

Dec. 5. COZENS-HARDY M.R. This is a separate point which we think it convenient to dispose of first. The main question is as to liability to reversion duty, and that depends really upon s. 13 of the Finance Act passed in 1910. That section contains in two places I think, certainly in one, the phrase "nominal rent" —"Where a nominal rent only has been reserved." Application was made by Mr. Danckwerts in the Court below to ask a question which, I think, if he could ask it at all, was put in a perfectly proper form, namely, he wished to ask the witness, a valuer, whether there is among persons dealing and conversant with the valuation of land for these purposes a generally understood meaning of the words "nominal rent." The Attorney-General objected in the Court below, but, as Mr. Danckwerts has said, there were two people talking at once and the witness said "Yes," but he was not allowed to say what their meaning was. Now this raises a point, the raising of which I confess is rather a surprise to me. I thought that a modern Act of Parliament was framed in language which is intelligible to everybody, and which applies not to any local custom or consideration of that kind, but to the whole of Great Britain (and I think beyond that, elsewhere, but at any rate to the whole of England). But we are asked to say that the Court ought to take evidence as to whether in dealing with this particular property there is some special and peculiar accepted meaning of these words "nominal rent." No case has been called to our attention, and I do not believe there is any case, in which, dealing with a modern statute, any such evidence has ever been admitted. The duty of this Court is to interpret and give full effect to the words used by the Legislature, and it seems to me really not relevant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the Court to

(1) [1892] A. C. 644. (2) (1888) 22 Q. B. D. 239, at p. 241.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. But to say we ought to allow evidence to be given as to whether there is any such technical meaning, to be followed up, of course, by evidence as to what that special meaning is, would I think be going entirely contrary to that which seems to be the settled rule of interpretation.

It is said, however, that the Court draws no distinction between statutes and other written documents. I am not prepared to say that that is true to the full extent. It is not a question of what the parties to a contract may have meant by the words that they have used; it is not a question of what a testator in making his will may have meant by the words he has used; it is I think a question of what is the meaning of the words used by the Legisture, without reference to any particular meaning attached to those words by a particular branch of the community. Illustrations have been given which seem to me to define the limit of the application of this doctrine. The case of *Shore* v. *Wilson* (1) really amounted to nothing more than this, that in considering what was the meaning of the words "godly preachers" the Court was entitled, and indeed bound, to have regard to what was the meaning of those words used at the time they were used by the testatrix, who belonged to a particular Christian community, and the Court said that the sense in which she used those words was a sense in which they ought to be construed in the will; but it was not for the Court at the time the matter came before them to consider what at that time and in that year would be understood to be the meaning of the words "godly preachers."

Many examples might be given of what the Court may do under such circumstances. The Court may and must consult literary authorities as to what is the meaning of words defining a particular class or body of men. One case which occurs to my memory, not perhaps now inapt, is a case decided before Sir John

(1) 9 Cl. & F. 355.

Romilly as to what was the meaning of the term "Particular Baptists," and what were the doctrines they held: *Attorney-General* v. *Gould*. (1) The Court investigated that as a matter of history, not by taking evidence but by examining books of ancient authority as shewing what was the meaning of those words; but that has no relation at all to what we are asked to do in the present case. I think it would be altogether contrary to principle and of the worst example if we were to allow this present application to succeed, by allowing evidence to be given as to the meaning which a certain branch of the community attaches to these particular words "nominal rent." In my opinion this application must be refused.

SWINFEN EADY L.J. I am of the same opinion. The claim that is now under consideration has reference to reversion duty, a duty imposed by a statute of 1910, and in this statute the phrase occurs "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of a covenant or undertaking to erect buildings or to expend any sums upon the property)." At the hearing counsel for the subject put this question to the witness: "In the minds and practice of surveyors dealing with property and the letting thereof professionally, have the words 'nominal rental' any technical meaning?" That was objected to, but the witness answered "Yes"; and then followed the legal argument as to the admissibility of the evidence.

Now the words "nominal rent" are prima facie ordinary English words and they have been used from time to time not only colloquially and in common parlance, but in Acts of Parliament, and reference has been made to the use of the words "nominal rent or other rent" in the Conveyancing Act, 1881, and "nominal rent or other rent less than the rent ultimately payable" under the Settled Land Act, 1882, and I daresay if search were made it could be ascertained that the same words are used in other statutes. It is the duty of the Court to construe a statute

(1) (1860) 28 Beav. 485.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the meaning of any words, but any evidence on the question is wholly inadmissible. The rule is correctly stated in Mr. Craies' book referred to by the Attorney-General, that with regard to modern statutes the doctrine of contemporanea expositio is of no value; and in my opinion evidence is not admissible as to the meaning of ordinary English words in a public Act of Parliament; we are not dealing with any private statutes nor with contracts. It is a public Act of Parliament, and the Court must take judicial cognizance of the language used without evidence.

PHILLIMORE L.J. I agree. I do not desire to express an opinion on any question larger than that which we have to decide, nor to draw a line, which requires some care in drawing, between evidence which is admissible and that which may not be admitted in elucidation of the meaning of a particular word or a particular collocation of words in some classes of written instruments. It is enough to say that in construing a modern statute, not dealing with the particular customs of a particular locality, or the practice of a particular trade, but of general application, evidence such as is sought to be adduced in this case is inadmissible.

Sir J. Simon, A.-G., for the Crown. Three points remain to be considered: (1.) the question whether or not the directions in the statute as to the mode of ascertaining the total value of the land at the beginning of the lease are obligatory. That is not disputed in this Court. (2.) The question whether this sum of 6000*l.* was a payment "made in consideration of the lease"; and (3.) the question whether the rent of 125*l.* is a "nominal rent" so as to permit the application of the words of s. 13, sub-s. 2, within brackets. It is submitted that Horridge J. has rightly decided those two latter points. Both are questions of construction of the Act. All that has to be done is to ascertain the total value upon the basis laid down by the Act. If that be not followed it might be impossible to ascertain at the expiration of a long lease what was the true value of the land at the time

of the granting of the lease. The only practical way is to adopt the method pointed out by the Act.

In *Inland Revenue Commissioners* v. *Marquess of Anglesey* (1) the Master of the Rolls had evidently in mind the case of a premium.

The answer to the argument that if the lessor had done the work and the lessee had indemnified him the result would have been different is that there may perhaps be ways in which the effect of a statute may be evaded. That does not justify putting another construction upon the Act. Here the payment was not "made at the time of the original grant of the lease."

[COZENS-HARDY M.R. Having regard to the terms of the agreement for a lease the lessee could not call for a lease until the expenditure had been made.]

Even so, if it had been a very old lease in this case, how could the amount have now been ascertained? In some cases it might be very difficult if not impossible, and the Court will not adopt so inconvenient a construction. A "nominal rent" is one which is a mere token or acknowledgment of the relation of landlord and tenant. The meaning of "nominal" is the same as in the phrase "nominal damages."

Danckwerts, K.C., in reply. "Nominal" is the antithesis of "true." Therefore a nominal rent is one which is not substantially the true rent.

Cur. adv. vult.

Dec. 19. COZENS-HARDY M.R. This appeal raises an important question as to the extent of the liability for reversion duty under the Finance Act, 1910. The material facts are as follows: In 1891 the trustees of the Camden estates made an agreement with Wilson, modifying an earlier similar agreement, under which Wilson agreed to take a lease for forty years from September, 1889, of a block of houses at a yearly rent of 125*l*. The schedule to the agreement specified certain work which had to be done by Wilson. He was not to be entitled to have any lease granted until all the works had been completed. The agreement was

(1) [1913] 3 K. B. 62, 69.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

subject to the approval of the Court, which was duly obtained, the then Marquis being an infant. It has been found as a fact that all the works agreed to be done were duly completed before the grant of the leases, and that the total expenditure upon such works was 6000*l.* Separate leases were granted of different portions, the consideration in each lease being expressed to be "the expense incurred by the lessee in adding to improving and repairing the messuage and buildings hereby demised and of the rent and covenants on the part of the lessee hereinafter reserved and contained." The total rents were 125*l.* All the leases are in the same form. In 1910 these leases were surrendered and new leases granted, and thereupon a claim for payment of reversion duty arose. No question arises as to the value on the "occasion," that is to say, on the surrender. It is agreed at 11,246*l.* But it is contended by the Crown that the total value of the land at the time of the original grant is to be estimated solely by capitalizing the rent of 125*l.* at twenty-five years' purchase. On the other hand, it is contended by the Marquis that 125*l.* was obviously no measure of the annual value of the property and that the 6000*l.*, paid as a condition precedent to the grant of the lease, must be taken into account.

By s. 13, sub-s. 1, the subject is to be taxed "on the value of the benefit accruing to the lessor by reason of the determination of the lease." That is the main guiding principle. Sub-s. 2 states what is to be deemed to be the value of the benefit accruing to the lessor. First ascertain the total value, within the meaning of s. 25, of the land at the time the lease determines subject to certain deductions not material to the present case, and next ascertain the total value of the land at the time of the original grant of the lease "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)." Now it is important to observe that the whole 6000*l.* was spent before the lease was granted. That sum was really part of the consideration for the lease and must be regarded in a wholly different way from sums paid during the currency of the lease in performance or

satisfaction of the covenants contained in the lease. It seems to me that the case falls within the precise language of sub-s. 2. It was urged by the Attorney-General that "payments made" in consideration of the lease mean payments made to the lessor and are not satisfied by payments which in substance are put into the land demised. I am unable to accept this view. It by no means follows that a premium, or fine, is payable to the lessor. Indeed the contrary is expressly provided in s. 4 of the Settled Land Act, 1884. "A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act." The fine must be paid to the trustees of the settlement. I see no reason for holding that the payments must be to the lessor. Suppose there are two plots of land of equal value: The landlord says to A., if you will spend 1000*l.* in building a house on the first plot, I will grant you a lease of it for ninety-nine years at a rent of 10*l.* The landlord says to B., if you will pay me 1000*l.*, I will build a house on the second plot, and will grant you a lease of it for ninety-nine years at a rent of 10*l.* Is there any real difference between these two cases? In my opinion there is not.

Stress was laid by the Attorney-General upon the inconvenience, amounting almost to impossibility, of ascertaining what was the value at the beginning of a long term of work done upon the premises. This difficulty necessarily arises where a "nominal rent only" has been reserved, and I think it is of no importance in interpreting the section.

In my opinion the judgment of Horridge J. was wrong and the appeal ought to be allowed.

SWINFEN EADY L.J. The question raised by this appeal has reference to reversion duty under the Finance Act, 1910. By s. 13, sub-s. 1, the value of the benefit accruing to the lessor by reason of the determination of a lease of land is subject to a duty of 10 per cent. called reversion duty. By s. 13, sub-s. 2, the value of this benefit is to be deemed to be the amount (if any) by which the "total value" of the land at the time the lease determines exceeds the "total value" at the time of the original grant of the lease, to be ascertained as therein mentioned.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

"Total value" is defined for the purpose of Part I. of the Act by s. 25, sub-s. 3.

The question arises with reference to six groups of houses comprised in divers leases. At the time when the leases determined, the parties are agreed that the total value of the land was 11,246*l.* The dispute is as to the total value at the time of the original grant.

The first agreement is dated June 6, 1889, between Wilson and the Camden trustees, whereby Wilson was to repair thoroughly certain houses, and have a lease of them at 125*l.* a year for terms of twenty-one years or twenty years respectively. This agreement was modified by a subsequent one dated February 17, 1891, and sanctioned by the Chancery Division. From this it appears that the works had then already cost more than had been anticipated, and Wilson agreed thereby to execute additional works specified in the schedule, and the terms were to be forty years and thirty-nine years respectively, all expiring on September 29, 1929. The lease or leases were to be granted as soon as the several works had been executed to the satisfaction of the surveyor of the Camden trustees. There were six leases, all granted after the works had been completed, and these were determined by surrender in 1910. The necessary expenditure by Wilson in executing the works was 6000*l.* The rent of 125*l.* capitalized at twenty-five years' purchase is 3125*l.* The sum of 6000*l.* was the actual expenditure by Wilson; it was the aggregate of moneys paid by him out of pocket for labour and materials, and fees properly payable in respect of the works. Although this sum was a payment by him to third persons, and a payment which he was obliged to make to obtain the execution of the works, and the payment was made and the expenditure incurred by him in consideration of the lease being granted, it was not a payment to the lessor.

Ought this payment to be taken into account in determining "total value" at the time of the original grant, on the basis of the rent reserved and payments made in consideration of the lease? This payment was a payment by Wilson in consideration of the lease being granted; Wilson was obliged to execute the works before the lease would be granted to him, and by consequence thereof to pay the money.

The evidence in this case is that 125*l.* was not a fair rental value, even for the site as bare land, apart from buildings upon it. The Marquis Camden adduced evidence that the site was worth 600*l.* a year, to let on a ninety-nine years' building lease. After the buildings had been repaired and certain new erections made by Wilson, at an expenditure of 6000*l.*, the rack rentals, after making all deductions for rates, taxes, repairs, and all outgoings except ground rent, amounted to 811*l.* a year.

It is quite obvious from these figures that "total value" at commencement far exceeded twenty-five years' purchase of 125*l.*, or 3125*l.*, and yet the claim of the Crown is that it is the difference between 3125*l.* and 11,246*l.*, or 8121*l.*, which is liable to the 10 per cent. tax.

In construing s. 13, it must be borne in mind that the duty imposed is on the value of the benefit accruing to the lessor by the determination of the lease, and that the benefit is the difference between "total value" at two different periods. If the lessee had paid to the lessor a premium of 6000*l.* in consideration of the lease, the lessor covenanting to expend that sum in the buildings, it could not have been disputed that such payment was a payment in consideration of the lease. It is in my judgment equally a payment, in consideration of the lease, although paid to third parties, when it is a payment made by the lessee before the lease is granted, and to pay for works forming part of the consideration for the lease.

Take the three following illustrations: (A) A freeholder upon a vacant site, worth to let on building lease 20*l.* a year, builds a house costing 2000*l.* In consideration of a premium or fine of 2000*l.*, he grants a lease of the house for ninety-nine years at a ground rent of 20*l.* a year. (B) The same freeholder agrees to let a similar site for building for the same term and ground rent. The lessee agrees to erect a house costing 2000*l.* and the freeholder to grant the lease as soon as the house is erected. This is done and the lease granted. (C) The freeholder grants a lease of the same site for the same term at the same rent, taking a covenant by the lessee to build within a reasonable time (say eighteen months) a house costing 2000*l.*

In all these three instances, the lessor is in practically the

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

same position when the transaction is carried out; if he parted with money in building he has been recouped his expenditure; he has a ground rent of 20*l.* for the term, with the reversion to the house on the determination of the term. In case A it could not be disputed that the fine or premium would be a payment made in consideration of "the lease" within s. 13, sub-s. 2.

On what ground, however, can it be said that the payment for the works in case B is not equally a "payment made in consideration of the lease"? The money is not paid to the lessor, but s. 13, sub-s. 2, does not say that it need be so paid. Sect. 32 of the Finance Act, 1910, which forms a portion of Part I. of the Act, evidently contemplates that money actually expended in buildings or upon the property before the grant of the lease forms part of the consideration for the lease; and s. 32, sub-s. 2, provides that in certain cases where the moneys have not been actually expended, but there exists only a covenant or undertaking to erect buildings or expend sums of money, there is to be allowed such sum as the Commissioners think just in respect thereof. It is difficult to recognize any principle or any definite scheme which allows the payment in case A as part of the consideration, but does not allow it in B, and only in C if the rent be a "nominal" rent. If, however, all endeavour to ascertain the real purpose or object of the Act in this respect fails, and the language of the statute must be construed without any assistance from this point of view, the 6000*l.* in question in the present case comes within the language used—it was a payment made in consideration of the lease, and must be taken into account in estimating total value.

In my opinion this appeal should be allowed.

PHILLIMORE L.J. In this case we have to determine for the purposes of reversion duty under s. 13 of the Finance (1909-10) Act, 1910, what is the total value of the land at the time of the original grant of the lease.

We are told by the section that this is to be ascertained on the basis of the rent reserved and payments made in consideration of the lease. The section further directs us to include certain

subjects which may be neither rent nor payments in consideration of the lease. I will deal with this paragraph of inclusion later.

By agreement made June 6, 1889, between the trustees of the will of the second Marquis Camden and William Henry Wilson, the trustees agreed to grant and Wilson agreed to take a lease of certain land and houses at Camden Town for twenty-one years as to part and twenty years as to the rest, at yearly rents totalling 125*l.*, Wilson undertaking to carry out the works specified in the schedule within eighteen months; and the lease, which was not to be granted until the works were executed, was to be in the form used on the Camden Town estate. By a further agreement, dated February 17, 1891, the original agreement was modified, the terms being extended to forty years and thirty-nine years respectively. The reason of this extension was that Wilson found that in order to fulfil his agreement he had to spend a larger sum of money than was originally contemplated. The sum which he spent was found by Horridge J. to be 6000*l.*

Ultimately six leases, all in similar form, were granted to Wilson, the terms being forty years from Michaelmas, 1889, or thirty-nine years from Michaelmas, 1890, at rents totalling 125*l.*; each lease witnesses that the demise is made "in consideration of the expenses incurred by the lessee in adding to, improving and repairing the messuages and buildings thereby demised, and of the rents and covenants on the part of the lessee." By agreements in January and August, 1910, these leases were surrendered, and fresh leases were agreed to be granted, and upon these surrenders reversion duty accrued to be paid by the present Marquis Camden. The total value of the property at the time the leases were determined is to be taken as 11,246*l.* The Commissioners contended that the benefit which has accrued to the Marquis is the difference between that sum and the capitalized value of the total rents, 125*l.*, and that the agreement by Wilson to expend, and the fact of his having expended, 6000*l.* is not to be taken into consideration.

Horridge J. has since determined that the rent is to be capitalized at twenty-five years' purchase, and both sides have

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

accepted this decision. The Marquis sought to have the sum of 6000*l.* added to the capitalized rent as together making the measure of the total value at the time of the original grant of the lease. The referee adopted the contention of the Commissioners, and his decision was affirmed by Horridge J. Hence this appeal.

Certain points were taken by counsel for the appellant as to which it was admitted that the decision of this Court in the case of *Inland Revenue Commissioners* v. *Marquess of Anglesey* (1) was against him, and so they were only saved in case of an appeal to the House of Lords. The point left for us to determine is whether the expenditure of 6000*l.* should or should not be held to be a payment made in consideration of the lease.

The decision of Horridge J. in this particular case was only a formal one, as he had given his reasons for putting his construction on the statute in a previous case—*Stepney and Bow Educational Foundation* (*Governors*) v. *Inland Revenue Commissioners.* (2)

It has been contended before us for the Crown that the payments referred to in the section are payments of premiums to the landlord, and that the covenanted expenditure upon the landlord's property, for which he reaps no benefit except such increased value as will be left in the buildings at the end of the term and a better security for his rent, is in no sense a payment to the landlord. This was the argument which specially commended itself to Horridge J. It was further argued that though the words "total value of the land" have a well-defined meaning in s. 25, and elsewhere in the statute, and in this section as applicable to the land at the time when the leases determine, the provision for ascertainment of the total value at the time of the original grant on the basis of rent and payment makes that an entirely different and incomparable total value. Reliance was further placed on the paragraph of inclusion as shewing that, excepting in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sum upon the property is not to be taken into account.

(1) [1913] 3 K. B. 62. (2) [1913] 3 K. B. 570.

This last argument the appellant sought to meet by the suggestion that the rents here were so far below the rents that could reasonably be asked for the property, that they were nominal only, and it was sought to adduce evidence to shew that a meaning of this nature was attached to the words "nominal rent" in the professional language of land agents. We refused to admit this evidence, and we have given our reasons for refusing, and I am of opinion that the Attorney-General gave the right answer to this contention for the appellant when he said that the words "nominal rent," which occur also in s. 32, meant a rent which suffices to express the relation of landlord and tenant, but gives no measure of value. As to this I think Horridge J.'s decision was right.

Assuming, however, that the argument of the Crown as to the meaning of the words "nominal rent" is sound, the bearing of the paragraph of inclusion upon the earlier words "payments made in consideration of the lease" still remains to be discussed.

The last argument for the Crown was one ab inconvenienti.

I now return to the four arguments for the Crown, and it is convenient to take the first and second together.

I approach this matter by reading sub-s. 1, the taxing part of s. 13. I find that on the determination of a lease the lessor is to pay a duty at the rate of 10 per cent. on the value of the benefit accruing to him by reason of the determination. This might mean that the landlord is to be taxed upon the good thing into which he has come: for example, he has been getting 5*l.* a year rent for house and land, and now the lease has come to an end he can let them for 100*l.* a year. Capitalize the two rents and the tax is a tenth of the difference. But this is not so. Nor indeed did I understand the Attorney-General to suggest that this was the principle of the tax.

Sub-s. 2 tells me that the value of the benefit, if any, is to be deemed to be the difference between the two total values, at the end and at the beginning, at the time the lease determines and at the time of the original grant.

I conceive that the Legislature intended that at any rate as far as possible these two total values should be commensurable and comparable. Sect. 14, sub-s. 4, shews that in such cases the

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

benefit whether for increment value duty or reversion duty may be identical. Now the total value at the end is to be ascertained according to s. 25. It is the value of the land with the buildings upon it. I should therefore anticipate that the total value of the land at the beginning was meant to be the land with the buildings upon it.

If at the beginning the lessor provided the house upon the land and reserved a rent, the capital value of the rent reserved would be the measure of the total value. If besides providing the house he took a premium and reserved rent, the capitalized rent plus the premium would be the measure. And this is what the statute says; and I do not understand the Attorney-General to dispute it. But if the lessor had not provided the house, but let the house and land for a smaller rent because the tenant had, in pursuance of a previous agreement, provided the house, the rent reserved, whether with or without a premium, would not be the full measure of the total value.

What would be the measure? It would perhaps be, strictly speaking, the rent plus the better security and plus the value of the house at the determination of the lease, a house which in the usual form of lease would have to be kept in repair. The statute gives him a somewhat better measure if it gives him the present value of the house as built, the expenditure in building in order to get the lease being a payment made in consideration of the lease, though the money expended or paid out is not paid to the lessor but laid out upon his property. But any advantage over the strict actuarial value will be compensated in practice by economical considerations which I shall mention later.

It so happens that with our system of conveyancing a premium may be paid to some one else than the lessor and rent may be reserved to some one else than the lessor. I use this as an illustration rather than as an argument.

The argument of the Attorney-General seems to come to this: A lessor deals with two similar plots of land. The first he agrees to let to a tenant at a rent of 2*l.* per annum for a term of ninety-nine years if and when the tenant has put up a house worth 1000*l.* As to the other he agrees if the tenant will give him 1000*l.* to put up a house of that value and then let it to him for

the same rent and term. At the expiration of the term he or his successor in title will in the first case be unable and in the second case able to take credit for the 1000*l.* in estimating the value of the benefit accrued. And yet in neither case did he spend a farthing and yet in neither case is he or his successor better off at the end.

Now comes the fourth argument, ab inconvenienti. It is said that it will be difficult in ordinary cases for the lessor to prove the expenditure, that the present case is an exceptional one by reason of the shortness of the original term and its still further shortening by the surrender, and that it would be different with an ordinary ninety-nine years' tenure.

I answer: So much the worse for the lessor or his successor. Indeed, in any case, I conceive that the lessor or his successor will not get the full value; for the purchasing power of the sovereign has decreased in the last ninety-nine years, and over and above this the cost of building has increased, especially in the last forty years, to an extent which I can only describe as enormous; and the total value at the determination will be measured by present building prices and will be proportionately higher. These are the economical considerations to which I have already alluded. None the less should the lessor be allowed to bring into account as many sovereigns as he can prove to have been expended in building, and thereby in my opinion buying the lease.

The third argument is from the paragraph of inclusion. The payments made in consideration of the lease are to include "where a nominal rent only has been reserved the value of any covenant or undertaking to erect buildings or to spend any sums upon the property." This, says the Attorney-General, is the only case where you can introduce any element of value beyond cash payments and rents; and this case only arises when the rent is nominal as already defined.

My first observation is that this disposes of the argument ab inconvenienti. If this paragraph covers cases where buildings have been erected before or shortly after the lease was granted, provided only that the rent reserved is a peppercorn, the difficulty of proving expenditure is not insurmountable.

C. A. 1913

CAMDEN (MARQUIS) v. INLAND REVENUE COMMISSIONERS.

Phillimore L.J.

This being so observed, I return to the words. They are apt for cases where in the lease there are covenants by the lessees to do work and expend money on the property during the lease. They do not apply prima facie or in their natural construction to payments or expenditure made beforehand under a preliminary agreement in order to obtain a prospective lease. The distinction between an agreement to do something on the property in consideration of getting a lease, or getting a lessee to take a lease, and a covenant in the lease itself is well known and has led to parol evidence of this prior agreement being admitted, in spite of the contention that all the terms of the bargain between the parties ought to be looked for in the lease itself. If it is asked to what cases then does the paragraph of inclusion refer, I answer that there are well-known "repairing leases" where a lessee undertakes during the period of his term, or some fixed part of it, to put the buildings into repair, and others where he contracts to repair some building or make some addition or improvement. If it be replied that there are usually not leases at a peppercorn, I observe that ninety-nine years' leases are not usually at a peppercorn after the first year.

In fact, it is to be supposed that this paragraph will seldom apply.

If one might speculate as to its origin I should conceive it thus: The case where the rent reserved would not be a fair measure because of these covenants arose, and the paragraph of inclusion in its unqualified state was suggested. Then it was noticed that this was too wide, that many leases at a full rent have nevertheless covenants which might be construed as covenants to expend sums upon the property, such as covenants to deliver up in repair, which may imply putting into repair, and covenants to paint at prescribed periods, but which nevertheless do not take from the full rent and ought not to be further valued. To meet this the somewhat unfortunate condition of "nominal rent" was introduced: I say "unfortunate" because it eliminates cases where the covenants will be a real though partial consideration, and because I believe that it reduces the operation of the clause, whether it be taken as I hold or as the Crown contends, to very rare cases.

I hold, therefore, that the paragraph of inclusion does not put

a construction upon the words "payments made in consideration of the lease" other than that at which I should otherwise arrive, and that the sum of 6000*l.* should be added to the capitalized rent in order to obtain the total value of the land at the time of the original grant of the lease, thus making the two total values as nearly commensurable as may be, and that the appeal succeeds.

C. A. 1913

CAMDEN (MARQUIS) *v.* INLAND REVENUE COMMISSIONERS.

Appeal allowed.

Solicitors: *Farrer & Co.; Solicitor of Inland Revenue.*

G. A. S.

PORTER *v.* TOTTENHAM URBAN DISTRICT COUNCIL.

[1913 P. 115.]

1914 *Jan.* 16, 21.

Contract—Building Contract—Obligation of Building Owner to give Possession—Possession given—Subsequent Interference by Wrong-doer—Delay and Damage to Builder—Liability of Building Owner.

By a contract in writing it was agreed that the plaintiff should build a school for the defendants, upon a site belonging to them, within ten months after the date of the contract, and that he should commence work and be at liberty to enter upon the site forthwith. The only access to the site was from a road adjoining other land of the defendants and over that land, and it was provided that the plaintiff should make a temporary roadway over that land from the street to the site. Possession of the site was given forthwith, and the defendants made a gateway through the fence separating their land from the street, and the plaintiff made and used the temporary roadway from the site through the gateway to the street. The owner of the soil of the street, alleging that it was not a public highway, prohibited its use by the plaintiff and threatened to sue him for an injunction. The plaintiff in consequence ceased work, for more than two months, until after the defendants had sued the owner of the soil of the street and obtained a decision that it was a public highway.

The plaintiff claimed damages for loss caused by the delay of the work, alleging a breach of the defendants' implied contract to give free and uninterrupted possession of and access to the site:—

Held, that there was no obligation, express or implied, upon the defendants to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site.

APPEAL of the defendants from the judgment of an official referee.

1914

PORTER v. TOTTENHAM URBAN COUNCIL.

The plaintiff sued the defendants for damages for the loss sustained by him owing to the interruption of the building work which he was carrying out for them under a contract, made on February 20, 1912. By the contract the plaintiff agreed to build a school for the defendants, upon a site belonging to them, for the sum of 11,043*l.*, according to the specification, plans, and bills of quantities thereto annexed; and it was provided that the plaintiff should be at liberty to enter upon the site immediately after the signing of the contract for the purpose of executing the works, and should commence the works forthwith, and complete the same within ten months from the date of the contract, subject to a penalty of 50*l.* for every week's delay in completion.

The specification contained the following clauses:—

"The contractor is to form and maintain a sleeper roadway from Keston Road, along the new passage shown on the block plan and across the school recreation field, or any other sleeper roadways on the site, for carting materials to the new school buildings, and is to maintain and shift and relay same as necessary and take up and cart away same on completion of the works."

"Reinstate and make good the kerbs footway and road next new entrance in Keston Road during the progress of the works as necessary and at the close of works, providing any new materials required, to the satisfaction of the local authorities or owners."

The only access to the site was from a road, called Keston Road, adjoining other adjacent land of the defendants, and across that land which was separated from Keston Road by a hedge.

Possession of the site was given to the plaintiff on February 20, and the defendants made a gateway in the hedge in order to enable the plaintiff to have access to the site. The plaintiff commenced work on February 20, and constructed a temporary roadway of sleepers from the site across the defendants' land and through the gateway. Keston Road was not made up on the side next to the defendants' land, and the sleeper roadway was continued to the centre of Keston Road. The plaintiff used the sleeper roadway and carted materials over it until March 6, when

one Rowley forbade him using the Keston Road and threatened to bring an action against him if he did not give an undertaking to cease using the road. The plaintiff gave the required undertaking and ceased work under the contract. Rowley was the owner of the soil of Keston Road, which was in fact a public highway; but he asserted that a strip of land along the defendants' hedge had not been dedicated by him to the public, and he erected a wire fence along this strip and across the gateway made by the defendants.

The defendants brought an action against Rowley for an injunction restraining him from obstructing the access to their land from the highway, and on May 11 judgment was given in that action in their favour. (1) The plaintiff then recommenced work on the site, and subsequently brought this action.

The plaintiff, in his statement of claim, alleged that by reason of the delay of the works he was put to great expense and suffered loss, and he claimed damages for breach of the defendants' implied contract to give him free and uninterrupted access to the premises and also because he had discontinued the work at the request and by the authority of the defendants.

The action was referred to an official referee, who held that the defendants had not fulfilled their obligation to give possession of the site and gave judgment for the plaintiff for 560*l.* damages.

The defendants appealed.

Cartwright Sharp (*Macmorran, K.C.*, with him), for the appellants. The question really is whether a building owner, under an ordinary building contract, undertakes to insure or indemnify the builder against damage caused by the wrongful acts or threats of an independent third party. The official referee has decided that, under their obligation to give possession of the site to the builder, these building owners are under an obligation to indemnify him if, after they have given possession, that possession is interfered with by a wrong-doer for whom they are not responsible. There is no such obligation. When the building owner has given the builder possession either immediately or within a reasonable time, as the case may be, and there

(1) [1912] 2 Ch. 633; [1914] A. C. 95.

1914

PORTER v. TOTTENHAM URBAN COUNCIL.

is no defect in his title, he has performed his obligation and is in no way responsible for any wrongful interference by a third party. The cases referred to by the official referee—*Freeman* v. *Hensler* (1) and *Lawson* v. *Wallasey Local Board* (2)—do not touch the present question; the decision in those cases was only that the building owner is under an obligation to give possession of the whole site and, in the circumstances of those cases, within a reasonable time. The general rule is that, if any unforeseen event or accident such as a fire, or interference such as by a riotous mob, prevents the performance of a contract without default on either side, any damage caused thereby to one party does not give a cause of action against the other: *Appleby* v. *Myers*. (3) That principle applies precisely to the present case. That the act or default of a third party for whom the building owner is not responsible does not impose any liability upon him appears from *Mitchell* v. *Guildford Union* (4) and *Leslie* v. *Metropolitan Asylums District Managers*. (5)

There was nothing in the conduct of the parties after Rowley interfered, or in the correspondence, to establish any request by the defendants to the plaintiff which could alter or affect the rights or liabilities of the parties under the contract.

Clavell Salter, K.C., and *B. A. Cohen*, for the respondent. The question is whether upon the terms of this contract there has been, in the events which happened, a breach of an implied warranty or undertaking by the defendants. By the terms of the contract, taken as a whole, the defendants were under an obligation to give the plaintiff free and uninterrupted possession of and access to the site; and there was an implied promise by the defendants to pay the plaintiff any loss he might suffer from ceasing the work when Rowley interfered. Under the contract the defendants were bound to give immediate possession of and right of access to the site. Their right to the means of access having been disputed, so that the work could not be carried on by the plaintiff, there was a breach of that obligation. This case is even stronger than *Freeman* v. *Hensler* (1), which is an

(1) (1900) 64 J. P. 260.
(2) (1882) 47 L. T. 625; 48 L. T. 507.
(3) (1867) L. R. 2 C. P. 651.
(4) (1903) 68 J. P. 84.
(5) (1901) 68 J. P. 86.

authority that the plaintiff is entitled to recover damages. Upon the fair and proper interpretation of this contract there is to be implied a promise that, if owing to altered circumstances the builder suffers loss, he is entitled to recover that loss from the building owner: *Bush* v. *Whitehaven Trustees.* (1)

Cartwright Sharp replied.

Cur. adv. vult.

Jan. 21. (2) RIDLEY J. This was a case in which the plaintiff had contracted with the defendant council to build a school for them for 11,043*l.* By clause 4 of the contract the contractor was to be at liberty to enter on the premises immediately after signing the agreement for the purpose of executing the works, to commence the works forthwith, and to deliver up the same fit for use within ten months of the date of the contract, subject to penalties.

It appears that the site of the school was so situated that access to it could only be obtained from a road called Keston Road. This road was separated from the field by a fence, and one half of it had not been made up. The soil of the road was vested in a Mr. Rowley, who had an adjoining building estate. The defendants, in order to give the plaintiff access to the site, made an opening in the fence and put a gate in it; and it was provided in the specification that sleepers were to be laid down from Keston Road over the land of the defendants for the purpose of carting materials to the site. The plaintiff began the work on February 20 in accordance with these provisions; but on March 6 he received a letter from Mr. Rowley claiming the right to prevent carts from passing over what he claimed to be his private property, and threatening an injunction. The plaintiff had no alternative except to give an undertaking not to proceed with the work, and the defendant council were given notice of this. Correspondence ensued. Mr. Rowley resisted all endeavours, claiming a small strip of land all along the side of the road, which would have prevented the access given under the contract. Finally, the defendant council were obliged to commence legal proceedings against Mr. Rowley, and they

(1) (1888) 52 J. P. 392. (2) The judgments were written.

1914

PORTER v. TOTTENHAM URBAN COUNCIL.

Ridley J.

obtained an injunction against him on May 11 (1), although the case was taken to the House of Lords and not finally decided till long after this date. The contractor after May 11 again proceeded with the work. It was in respect of this delay (from March 6 to May 11) that the present action was brought to recover from the defendants the damages caused thereby. I cannot find anything in this correspondence, or in these proceedings, which would alter the rights of the parties to the contract as they were when the work was stopped.

The official referee gave judgment for the plaintiff for 560*l.*, holding that the defendant council were bound on making the contract to give immediate possession of the whole site and that they had failed to do so.

I think that in such a contract as this the defendants were under an obligation to give immediate possession, because the contractor was bound to begin at once on the work and to finish within a certain time, subject to penalties; with a less stringent clause the result would have been the same. In *Freeman* v. *Hensler* (2), where the contract merely provided that the work should be finished in six months, the Court of Appeal held that it was implied that the building owner should give immediate possession of the whole site. *Mitchell* v. *Guildford Union* (3) was also referred to, where the same principle was approved but was held not to apply because in that case the delay was caused by a sub-contractor, the choice of whom and the dealing with whom were left by the agreement to the builder himself. *Leslie* v. *Metropolitan Asylums District Managers* (4) is to the same effect, as also *Lawson* v. *Wallasey Local Board.* (5)

But in this particular case the facts present this peculiarity, that the reason of the delay, of the failure to perform this obligation, was the interference of a third person who was a mere trespasser, over whom the building owners had no control, and with whose acts they could not have dealt otherwise than they did. If the obligation were held to apply in such a state of things,

(1) *Tottenham Urban District Council* v. *Rowley* [1912] 2 Ch. 633; [1914] A. C. 95.
(2) 64 J. P. 260.
(3) 68 J. P. 84.
(4) 68 J. P. 86.
(5) 47 L. T. 625; 48 L. T. 507.

it would be difficult to define any limit to the liability of the building owner. The obligation to give prompt possession is based on the builder's contract to complete the work in a given time, subject or not to penalties. In the absence of such a provision, the obligation would be otherwise; it would be for the building owner to give possession, and for the builder to complete, in a reasonable time. Therefore the liability put on the building owner has relation to the contract. There is no reason to be deduced from the position of the parties to the agreement why one of them rather than the other should be held to take on himself responsibility in the event of accidents happening which render its performance impossible. The class of cases of which *Appleby* v. *Myers* (1) is one was quoted in the argument, and Mr. Clavell Salter did not endeavour to contend that, in the case of fire or other force majeure, there would be a liability on the building owner. He argued that, admitting that not to be so, still he is liable for anything that may happen relating to his title to or possession of the site, and that therefore he was liable in this case for the consequences of the interference of Mr. Rowley. But that interference was as much beyond the control of the building owner as a fire or any other unforeseen occurrences such as have been indicated. The distinction seems to be an artificial one and would leave the liability of the building owner much wider than it need be, having regard to the reasoning on which rests the liability itself. I do not think there is any sound reason why it should be so extended. In other words the building owner does not insure that prompt possession and use of the site shall be given, he undertakes that it shall be so far as his own acts and ability are concerned, but not otherwise.

For these reasons it appears to me that the decision of the official referee was erroneous and should be reversed, and that judgment should be given for the defendants.

BANKES J. This is an appeal from a decision of the official referee who decided, in favour of the plaintiff, that he was entitled to recover damages from the defendants. The circumstances under which the plaintiff's claim was made are as

(1) L. R. 2 C. P. 651.

1914

PORTER v. TOTTENHAM URBAN COUNCIL.

Bankes J.

follows. On February 20, 1912, the defendants, who are the education authority for their district, entered into a building contract with the plaintiff whereby the plaintiff agreed to erect for them an infant school at West Green, Tottenham. The contract was a lump sum contract, and it provided that the contractor should commence the work forthwith and complete the same within ten months from the date of the contract, under penalty. The land upon which the school was to be erected is stated in the contract to belong to the defendants, and they undertook that the contractor should be at liberty to enter upon the same immediately after the signing of the agreement for the purpose of executing the works.

The site of the proposed new school was at the back of an existing school. There was no access from the site direct on to any road or street, and for the purpose of providing an access for the contractor to the site the defendants proposed to utilize a strip of their land lying to the north of the site for the purpose of a temporary roadway which should connect the site with a street known as Keston Road. The specification and bills of quantities provided for the making of this temporary road by the contractor. Immediately upon the signing of the contract the plaintiff entered upon the site and upon the adjoining land which was to form the temporary road, and commenced work including the laying of the necessary sleepers to form the temporary road, and having completed this road he commenced using it and did use it up to and including March 5. On this date the plaintiff received notice from the solicitors to a Mr. Rowley that he had no right to use Keston Road as a means of access to the said site, and after consulting his solicitors the plaintiff gave an undertaking not to do so, a course which was subsequently approved of by the defendants' advisers. The result of this was that all access to the site was cut off, and it was impossible to continue the work under the contract.

The grounds upon which Mr. Rowley based his claim to forbid any use of Keston Road by the plaintiff for the purposes of his contract were, that he had laid out Keston Road upon his own land as part of a building scheme, that he had only dedicated part of it to the public, not including the part next the temporary

road, and that in any event he had reserved a small strip intervening between the land of the defendants on which the temporary road was laid and Keston Road, so that the plaintiff could not use the proposed access to the building site without trespassing on his land. The defendants contested this claim of Mr. Rowley and at once took steps to defeat it. In the first instance they pulled down certain fences erected by Mr. Rowley to obstruct the access, and when these were re-erected they commenced legal proceedings against him. By May 11 the defendants had succeeded in obtaining an injunction from Joyce J. restraining Mr. Rowley from any longer interfering with the proposed access. (1) This injunction was upheld by the Court of Appeal and the House of Lords. The proceedings before Joyce J. had a double effect. In the first place they enabled the plaintiff to resume his building operations by the end of May; and in the second place they established the fact that the interference by Mr. Rowley with the plaintiff's access to the building site was wrongful and unjustifiable.

The plaintiff having resumed the building operations continued them and completed his contract. In January of the following year he commenced the present action, claiming damages in respect of the stoppage of the work which occurred owing to no fault of his own between the months of March and May of the previous year.

The plaintiff did not, as perhaps he might have done, rest his case upon the ground that the contract anticipated a free and continuously uninterrupted access to the site by means of the temporary road, and that owing to the default of neither party circumstances had been so altered as to justify a claim by him for the additional expenses to which he had been put, as upon a quantum meruit. There is authority in support of such a claim if the facts justify it: see *Bush* v. *Whitehaven Trustees* (2) and *Thorn* v. *London Corporation*, per Lord Cairns L.C. (3) The plaintiff, however, rested his case before us upon two grounds—first, an alleged warranty by the defendants against interference

(1) *Tottenham Urban District Council* v. *Rowley* [1912] 2 Ch. 633; [1914] A. C. 95.

(2) 52 J. P. 392.

(3) (1876) 1 App. Cas. 120, 127.

1914

PORTER v. TOTTENHAM URBAN COUNCIL.

Bankes J.

in the free and uninterrupted use by him of the site and the access thereto, or, secondly, a promise by the defendants to repay him any increased expenses to which he might be put arising from an alleged request by the defendants to him to stop the works pending the decision of the dispute with Rowley. I doubt if this latter question was raised before the official referee; at any rate he gave no decision upon it. In the view of the facts which I take, the plaintiff must fail on this second ground, even if it is open to him on his pleadings, because I do not think that under the circumstances of this case any request was proved from which any such promise to repay can be implied.

The argument before us was almost entirely confined to the first question. It was admitted that no authority could be found which covered the point, but it was contended that the decision of the official referee in favour of the plaintiff was right, having regard to certain decisions to which he was referred, and the language of the contract as properly construed. The decisions to which reference was made were *Freeman* v. *Hensler* (1) and *Lawson* v. *Wallasey Local Board*. (2) In my opinion these decisions do not help the plaintiff. They are decisions to the effect that a building owner, who has agreed with a contractor that he shall erect a building or do some work for him within some specified time, must give the contractor possession of the site, either at once or within a reasonable time, so as to enable him to carry out the contract, and that, if owing to some default on his part the owner fails to give such possession, he is liable in damages to the contractor. That is a very different proposition to the one contended for here, which is that, although the building owner has given the builder possession of the site, and has done his best to effectually dispose and has disposed of a subsequent unauthorized and wrongful interference with that possession by a third party, he is nevertheless, though in no default himself, liable to indemnify the builder against the consequences of such interference.

It is contended for the plaintiff that the terms of the building contract justify this contention and that an agreement to this effect is either expressly or impliedly contained therein. I do not

(1) 64 J. P. 260. (2) 47 L. T. 625; 48 L. T. 507.

agree with this contention. There is not, in my opinion, any express agreement to the effect contended for, nor is there any ground for implying any such agreement. It was argued by Mr. Salter that the agreement for which he was contending should be limited to an interference by some one challenging the title of the defendants. I can see no ground for imposing any such limitation. If the agreement exists at all, it must, in my opinion, be an unqualified and unlimited one. It must extend to all acts of interference by whomsoever made, and however unjustifiable or wrongful, and to all damage however extensive or however small. Applying the test laid down by the Master of the Rolls in *Hamlyn* v. *Wood* (1), I cannot think that the parties must have intended that such a stipulation should exist. The plaintiff's remedy, if he has one, in my opinion lies in the application of the principle of *Bush* v. *Whitehaven Trustees* (2) to his case, and the present attempt to establish the cause of action contended for fails.

Appeal allowed.

Solicitors for appellants: *Howard & Shelton, for Francis Shelton, Tottenham.*

Solicitors for respondent: *Hutchison & Cuff.*

(1) [1891] 2 Q. B. 488, 491. (2) 52 J. P. 392.

J. H. W

C. A.
1913
Nov. 27;
Dec. 3, 4.

[IN THE COURT OF APPEAL.]

DAVIES AND ANOTHER *v.* THE GLAMORGAN COAL COMPANY, LIMITED.

[1913 D. 80.]

Mine—Coal Mine—Minimum Wage—Actual Daily Earnings of Workman—Method of ascertaining—Power of Joint District Board to make Rules—Inability of Workman to earn Minimum Wage—Circumstances beyond his Control—Rule requiring Notice to Official—Regularity and Efficiency of Work—South Wales District Rules—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2).

The purposes for which a joint district board are empowered under the Coal Mines (Minimum Wage) Act, 1912, to make general district rules do not include the provision of a method for ascertaining the rate of the actual daily earnings of the workmen. Therefore a rule which provided that "In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks" was held to be ultra vires and void.

By s. 1, sub-s. 2, of the Act, "The district rules . . . . shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen." A joint district board made a rule that if a workman from circumstances over which he alleged he had no control was unable to perform such an amount of work as would entitle him to a sum equal to the daily minimum rate he must forthwith give notice thereof to the official in charge of the district, and in default of such notice should forfeit his right to wages at the minimum rate for that pay:—

Held, that the rule was authorized by s. 1, sub-s. 2.

Judgment of Pickford J. [1913] 3 K. B. 222 varied.

APPEAL from the judgment of Pickford J. (1)

The plaintiffs were colliers employed by the defendants in their colliery at Llwynypia, Glamorgan. The said colliery is within the South Wales (including Monmouth) district created by the Coal Mines (Minimum Wage) Act, 1912. The joint district board constituted under that Act to settle the minimum rates of wages and the general district rules for the district failed to agree, and thereupon Viscount St. Aldwyn, the chairman of the said board,

(1) [1913] 3 K. B. 222.

by his award dated July 5, 1912, settled the minimum rates of wages, and fixed the standard rate of day wage for a collier working at piecework at such a sum as with the addition of a certain percentage to which the workmen were entitled under the Conciliation Board Agreement of 1910, varying with the price of coal, amounted to 7*s.* 1½*d.* He also by his award made general district rules for the district.

By rule 2 of those rules "the word 'workman' means any person to whom the Coal Mines (Minimum Wage) Act, 1912, applies, the word 'pay' means the period in respect of which the workman's wages are for the time being payable, and the word 'day' means a colliery working day."

By rule 5, " . . . . Every collier and collier's helper shall at all times work, get, and send out the largest possible quantity of clean coal contracted to be gotten from his working place and shall perform at least such an amount of work as, at the rates set forth in the price list or other agreed rates applicable, would entitle him to earnings equivalent to the minimum rate. If at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged, and if such official shall not agree that the workman cannot earn at the work upon which he shall be engaged a sum under the price list or other agreed rates equal to the daily minimum rate, then the matter shall be decided in the manner provided by rule 8. The management shall be at liberty to remove the workman to some other part of the colliery.

"If any workman shall act in contravention of this rule he shall forfeit the right to wages at the minimum rate for the pay in which such contravention shall take place."

By rule 7, "(1.) In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks.

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

"Upon the average earnings of any workman for two weeks being ascertained in accordance with this rule, the wages of such workman shall be adjusted and the amount found to be due to or from him ascertained and paid or debited to him as the case may be, and in the latter event the amount debited shall be deemed to be a payment on account of wages to become subsequently due to him."

In the South Wales district the "pay" had formerly been a fortnight, but was now one week.

The plaintiffs, who sued on behalf of themselves and all others the colliers being workmen within the meaning of s. 5, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, employed by the defendants, claimed in the statement of claim a declaration (1.) that the plaintiffs and the said colliers were entitled to be paid as a minimum wage for each day on which they respectively worked a sum not less than the sum fixed by the award, namely, 7*s.* 1½*d.* (2.) In the alternative that the plaintiffs and the said colliers were respectively entitled to be paid as a minimum wage at a rate not less than the rate fixed by the said award, namely, 7*s.* 1½*d.*, for each day on which they respectively worked during the pay (that is to say taking an average of the actual wages earned over the week). (3.) That rule 7 was ultra vires and of no effect. (4.) That the said sums were payable whether any notice such as purported to be required by rule 5 should have been given or not, and that the rule was ultra vires and of no effect in so far as it required such notice to be given.

In addition to hewing and getting the coal, which is the remunerative part of the collier's work, he has to discharge various other ancillary duties, such as ripping, which consists of cutting away the roof or soil above the seam for two or three feet in height to allow of headway in the roads, walling the sides, setting up timber, laying rails for the trams, &c. The ripping is in the defendants' colliery not paid for separately, the remuneration for it being included in the payment for getting and sending up the coal. The other ancillary duties above mentioned, which are comprehended under what is known as "dead work," are paid for separately. Dead work is not paid for day by day, but is measured up weekly, usually in the middle of the week on

Wednesday or Thursday, and is paid for on the Saturday in the following week, when it is added to that week's wages for the coal getting, which are paid to date. The evidence called for the defendants went to shew that it would be impossible in practice for the colliery officials to prevent the men from doing all their ripping or dead work in one week and leaving the coal getting to the next.

Pickford J. held that rule 5 was intra vires as laying down a condition with respect to the regularity and efficiency of the work to be performed by the workmen. He held that rule 7 (1.) was ultra vires and void, as the Act gave no power to the district board to make a rule providing for the method of ascertaining the actual daily earnings of the workmen; but that the employers were independently of the rules, and by reason of the settled practice of paying wages at weekly or longer intervals, entitled, when paying the workman's wages, to consider what were his average earnings during the "pay" for the purpose of seeing whether some addition was required to bring them up to the minimum rate. He made a declaration accordingly.

The defendants appealed, and the plaintiffs gave notice of cross-appeal.

Leslie Scott, K.C., and *Harold Morris*, for the defendants. By s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman"; and by s. 2, sub-s. 1, "nothing in this Act shall prejudice the operation of any agreement entered into or custom existing before the passing of this Act for the payment of wages at a rate higher than the minimum rate settled under this Act." Therefore the scheme of the Act is to leave existing contracts unaffected except for the introduction of the implied term as to a minimum wage. The Act speaks of a "minimum rate" of wages, and s. 2, sub-s. 1, says that in settling the minimum rate of wages the district board "shall have regard to the average daily rate of wages paid to the workmen." There is nothing in the Act

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

which affects the contractual rate of wages actually earned; there is nothing which prevents the employers and workmen from agreeing upon the mode in which the rate of the actual wages earned shall be ascertained so as to enable comparison to be made with the minimum rate of wages. It is not contended that the Act in terms gives the district board power to make a rule for the ascertainment of the actual wages earned. (1) That is for the ordinary tribunals of the country to determine, if the parties do not agree upon it, when the workman sues for his minimum wage. The learned judge in this case had no jurisdiction to determine it. But if a rule is in substance a rule either for explaining the minimum rate of wages, or for laying down conditions with respect to the regularity and efficiency of the work, the fact that it is couched in language which seems to shew that it is dealing with the mode of ascertainment of the actual wages earned will not make it ultra vires. The Court, in seeing whether a rule is ultra vires, has regard to the substance and not the mere form. The rules cannot fix the rate of wages earned, and the language of this rule seems at first sight not to be justified by the Act. But in the first place rule 7 (1.) is in substance and reality

(1) By s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912, "The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen (including workmen partially disabled by illness or accident) and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

"The district rules shall also make provision with respect to the persons by whom and the mode in which any question whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section."

a rule for explaining the meaning of the minimum rate of wages settled by the district board. The Act does not say that the district board are to settle a minimum daily wage; they are by s. 2, sub-s. 1, to settle "minimum rates of wages." That minimum rate is to be compared with the rate of the actual earnings, and the district board have power to say when "settling" a minimum rate of wages that they mean a rate which is to be compared with an average rate of actual earnings. It is involved in the settlement of the minimum rate. That average might be taken over a long or a short period so as to get a fair comparison, and the rule has fixed a fortnight. Nearly all the rules of the various districts have an averaging rule. The working of rule 7 (1.) may be illustrated by the concrete case taken in the Court below. In the week ending September 7 the men had earned 8*s.* 9*d.* each per day, and in the week ending September 14 they had earned 5*s.* 10*d.* each per day. Under rule 7, assuming that the men worked the same number of days in each week, the actual daily earnings would be 7*s.* 3½*d.* each, which would exceed the minimum wage; whereas, if the plaintiffs are right, the men would be entitled to an addition of 1*s.* 3½*d.* per day in respect of the second week in order to bring each day's wages up to the minimum wage of 7*s.* 1½*d.* The Act speaks of minimum "rates" of wages, and a rate means a rate measured in time. The Act introduces into the piecework system of payment a temporal element, and the district board have to settle minimum rates of wages on that basis. It is open to them to adopt what unit of time they please, and to say that the rate so settled shall be compared with the rate of wages earned over a similar period of time. By s. 2, sub-s. 1, the board in "settling" any minimum rate of wages "shall have regard to the average daily rate of wages paid to the workmen of the class." Though the district board have no power to fix the mode of ascertaining the rate of the actual earnings of the workmen they have power to say that the minimum rate of wages which they settle means a minimum rate to be compared with the actual earnings calculated over a similar period. It would be impossible to apply the minimum rate by way of comparison unless an average of the actual wages earned were arrived

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

at, and it is within the powers of the district board to make that provision for the purpose of explaining the minimum rate. The Legislature has empowered the district board to settle minimum rates of wages, and whatever is fairly incidental to that ought not to be held to be ultra vires: *Attorney-General* v. *Great Eastern Ry. Co.* (1); *London County Council* v. *Attorney-General* (2); *Attorney-General* v. *Mersey Ry. Co.* (3) [*Randle* v. *Clay Cross Co.* (4) was also referred to.]

In the next place, rule 7 (1.) is really a rule laying down conditions as to the regularity and efficiency of the work within the meaning of s. 1, sub-s. 2, of the Act. It prevents a workman doing all the unprofitable work, at which he would not earn the amount of the minimum wage, in one week, and getting all the coal, at which he would earn considerably more than the minimum rate of wages, in the next week. The rule promotes regularity and efficiency of work by taking away the temptation to do all the non-productive work at one time, instead of doing a fair proportion of each work in each week. The rule will therefore tend to produce regularity and efficiency of work, though on its face it does not profess to deal with regularity and efficiency. The decision of the learned judge was therefore wrong.

J. Sankey, K.C., and *R. E. L. Vaughan Williams*, K.C. (*Ralph Sutton* with them), for the plaintiffs. The plaintiffs abandon their claim for a declaration under head (1.) or head (2.) in the statement of claim. They do not now ask for a declaration that they are entitled to be paid a minimum wage either day by day or week by week. This Court is not in the present action the proper tribunal to determine that question. The plaintiffs, however, contend that rule 7 (1.) is ultra vires. The object of the Coal Mines (Minimum Wage) Act, 1912, is to provide for minimum rates of wages, and not to ascertain the amount of the actual wages earned. Therefore any rule which purports to lay down conditions as to the ascertainment of the actual wages earned is ultra vires. It is for the ordinary tribunals to determine whether the actual wages earned come up to the minimum rate of wages. In settling the minimum rate of wages all the

(1) (1880) 5 App. Cas. 473.
(2) [1902] A. C. 165.
(3) [1907] A. C. 415.
(4) [1913] 3 K. B. 795.

facts, such, for instance, as the existence of abnormal places, have been considered, and regard has been had to "the average daily rate of wages paid to the workmen of the class for which the minimum rate is to be settled." But nowhere in the Act can there be found any mandate to the district board to fix the amount of the actual wages earned. By s. 2, sub-s. 1, minimum rates of wages and district rules for each district are to be settled by the joint district board. The powers of the district board to make rules are stated in s. 1, sub-s. 2. The rules may lay down conditions (1.) with respect to the exclusion from the right to wages at the minimum rate of aged and infirm workmen; (2.) with respect to the regularity and efficiency of the work; (3.) with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency; (4.) providing for forfeiture of the right to wages at the minimum rate if the workman does not comply with conditions as to regularity and efficiency of work; and (5.) providing for the settlement of certain questions. Those directions have been followed. Rule 3 deals with (1.); rules 4 and 5 deal with (2.) and (4.); rule 6 deals with (3.); and rule 8 deals with (5.). Rule 7 (1.), however, is a rule which purports to lay down how the average earnings of the workmen are to be ascertained for the purpose of being compared with the minimum rate of wages. The Act never intended to give such a power to the district board. The earlier part of rule 5 removes any possible hardship upon the employers by reason of a workman doing unprofitable work on several days and then sending up nothing but coal on the next few days and thereby earning large sums on those days, because it requires the workman to get the largest possible quantity of coal at all times. When the workman claims to recover a sum of money as being due to him under the Act, the tribunal which determines that question will have to say how the actual earnings of the workman are to be arrived at. This rule purports to oust the ordinary jurisdiction of the Courts to determine that question of fact. The rule is therefore ultra vires.

With regard to the cross-appeal, rule 5 purports to be a rule laying down conditions as to the regularity and efficiency of the

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

work. The part of the rule objected to is that which says that "then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged." Under the Act the one condition which entitles a workman to the minimum wage is that he is unable to earn that amount. The effect of this rule is to make his right to the minimum wage depend also upon his giving notice to the official in charge of the district, and if he does not do so he will forfeit his right to wages at the minimum rate. The Act nowhere imposes that as a condition of the workman's right to wages at the minimum rate. It is not a rule for ensuring regularity and efficiency of work. Regularity and efficiency refer to something which is to be done while the workman is at work, not, it may be, after the particular work is finished. Notice of the character of the work which the workman has done has nothing to say to the regularity and efficiency of that work. If this rule is intra vires a rule might be made requiring notice to be given on the first day of the following month. It is not a question whether the rule is a reasonable one. The rule throws the onus on the workman of giving notice, and there is no provision in the Act authorizing this.

Leslie Scott, K.C., in reply. It is now admitted that the learned judge had no power to say that the average daily earnings of the workman ought to be calculated over one week, or how they ought to be ascertained. That part of the judgment therefore cannot stand.

[He was not called upon to argue the cross-appeal.]

VAUGHAN WILLIAMS L.J. The questions to be decided in this case, now that counsel for the plaintiffs have withdrawn their claim for a declaration under the heading either (1.) or (2.) in the statement of claim, are only two—one is whether rule 7 (1.) of the district rules for South Wales is ultra vires, and the other is whether rule 5 is ultra vires.

With regard to rule 5 I am of opinion that it is not ultra vires. This is affirming the decision of Pickford J., though he expressed some doubt upon the point. I hold without doubt that rule 5 is intra vires The learned judge said: "The other rule the validity of which has been questioned in this action is rule 5. It provides

that 'If at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate, then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged' on pain, in the event of his failing to do so, of losing his right to be paid at the minimum rate for that pay. The question is whether that is laying down a condition with respect to the regularity and efficiency of the work. On the whole I think it is, though it is undoubtedly very near the line. It contributes to regularity and efficiency that a man should not be able to shirk his work and subsequently, at a time when the correctness of his statement cannot be tested, say that the reason why he did so little was that he was prevented by the conditions from doing more. I think that rule 5 falls within the powers conferred by the Act." So do I. It seems to me to be impossible for the work to be conducted with regularity and efficiency if the person who seeks to justify his inability to perform the necessary work is not under an obligation immediately to give notice of the difficulty to the official in charge. If he is allowed to postpone the information to such time as he chooses, it seems to me that it would be very difficult to investigate the truth of the grounds on which the workman based his claim.

There remains rule 7 (1.) to be dealt with. That rule provides that "In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks. Upon the average earnings of any workman for two weeks being ascertained in accordance with this rule, the wages of such workman shall be adjusted and the amount found to be due to or from him ascertained and paid or debited to him, as the case may be, and in the latter event the amount debited shall be deemed to be a payment on account of wages to become subsequently due to him." In my judgment there is no power in the joint district board to make such a rule. It is not suggested

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

Vaughan Williams L.J.

that in s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912, which defines the powers and duties of the district board as to making rules, there is express mention of any such power, and I do not think that we ought to or indeed can invent a power which is not within those given to the district board by the Act.

There was another matter which was originally put forward on behalf of the plaintiffs as to how the rate of the actual earnings of the workmen was to be ascertained. The claim was that it ought to be ascertained either day by day, or by taking an average over a week. I deliberately refrain from expressing any opinion upon that matter. It is not now before us. It was before us at one time, but counsel for the plaintiffs have withdrawn any such claim, and we are therefore relieved of the duty of expressing an opinion as to whether the actual earnings of the workmen should be arrived at day by day, or by taking an average of a week or a fortnight, or perhaps even longer. We have nothing to do with that now. It is not only wise to limit our judgment to matters which we have to decide, but it is our duty not to go into questions which, although they were once before us, are so no longer, and therefore I express no opinion upon the question.

The result is that we pronounce rule 5 to be intra vires, and rule 7 (1.) to be ultra vires.

BUCKLEY L.J. In this case the Court has to determine the true construction of the Coal Mines (Minimum Wage) Act, 1912, so far as it is necessary to do so in order to answer the question whether rules 5 and 7 (1.) made by the joint district board for the South Wales district, or either of them, are or are not ultra vires.

For the purpose of my judgment it is necessary to bear in mind from the outset the difference between a rate and a sum. A rate is a thing which exists only as a computed or estimated thing. It is the amount of one thing which corresponds or has relation to a certain amount of some other thing. Take, for instance, speed. Speed is not so many miles nor so many hours. It is a resultant sum based upon miles and hours, namely, so

many miles travelled in an hour. Speed is, say, sixty miles an hour. Every rate has two elements in it, and one of them is generally the element of time. If a man is paid six shillings a day for the first three days in a week and two shillings a day for the last three days in the week, he is paid during the week at the rate of four shillings a day. He never receives a wage of four shillings for any day, but he receives at the rate of four shillings a day for each of six days. Bearing this in mind, I have to construe an Act of Parliament which provides that a certain implied term shall be added to every contract for the employment of a particular class of workmen. The implied term is that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act. Having regard to what I have said, that necessarily means wages at a rate not less than the minimum rate. It is impossible to compare wages, which are a sum of money, with a rate which is such a thing as I have described. The comparison must be of rate with rate. Therefore the enactment must mean wages at a rate not less than the minimum rate. Sect. 2, sub-s. 1, of the Act uses those words, for it speaks of "the payment of wages at a rate higher than the minimum rate settled under this Act." The language in s. 1, sub-s. 1, has exactly the same meaning as in s. 2, sub-s. 1. The provision therefore is that wages shall be paid at a rate not less than the minimum rate. In this particular industry a workman has to do various classes of work which are paid for at various prices. He has to do ripping, timbering, and various other things, and, as his principal work, coal getting. Assume that he has three classes of work to do, A, B, and C, which are paid for at different prices and which he does on different days or at different times on the same day. Assume that these are all classes of work which he must do in the course of his employment to produce that which is the ultimate result, namely, the raising of coal to the surface. For the purposes of this Act it has to be ascertained what is the rate at which he is being paid. In order to do that it seems to me that such a period of time must be taken as will fairly cover a normal amount of each of the three classes of work, namely, A, which I will assume is paid badly, B, which is paid better,

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

Buckley L.J.

and C, which is paid best. Such a reasonable period of time having been determined, an average has to be taken, and when that is done it is found that the workman is being paid at the rate of so much a day, or so much an hour, or whatever time may be taken. I find that in this Act the minimum rate, the thing which has to be determined for the purposes of the Act, is contemplated (I say no more) as being a daily rate. I arrive at that in this way. Sect. 2, sub-s. 1, provides that in settling a minimum rate of wages the joint district board shall have regard to the average daily rate of wages. It would be competent for the district board, though I do not say that they are bound to do so, to settle the rate as a daily rate. If that be so, and a daily rate is settled, then for the purpose of determining whether a workman is being paid at a rate less than that rate one must necessarily, in order to compare the two rates, ascertain the daily rate of wages which he is actually earning, and thus find out by such comparison whether the daily rate of his actual earnings is less or more than the daily rate fixed as the minimum. If it be less, the Act provides that it shall be an implied term of his contract of employment that the employer shall pay to him the difference.

That being the scheme of the Act, there is no question but that it has been remitted to the joint district board to determine one of the two rates of which I have been speaking, namely, the minimum rate; but I cannot find anything in the Act which remits it to the joint district board to determine the other rate, namely, the rate of the workman's actual earnings. For the purpose of determining whether rule 7 (1.) is or is not valid the question is whether or not it has been remitted to the joint district board to determine the rate of the wages actually earned. I have failed, and counsel have failed, to find anything in the Act giving that power in so many words to the joint district board. It is not there. It is material also, I think, to notice that the second clause of s. 1, sub-s. 2, which provides that the district rules shall make provision with respect to the persons by whom certain questions are to be determined,—I will call it shortly a provision for arbitration—does not contain any words to the effect that the rules shall make provision with

respect to the persons who shall determine what is the rate of wages actually earned. It is a matter vital to be determined, and certainly one would have expected to find the provision there, if it was intended that the question should be determined by arbitration under that clause. It is not there. So far there is nothing in the Act to provide that the rate of wages actually earned shall be determined under any provision in the Act, or under any rule to be made by virtue of a power contained in the Act.

Then it is said on behalf of the defendants that it is possible to spell out of the provision in s. 1, sub-s. 2, of the Act—that the district rules shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen—an authority to determine the rate of wages actually earned. I confess that I have been quite unable to follow the argument. I do not see the step by which I am to get from the one to the other. Conditions as to regularity and efficiency might or might not affect the rate. I do not know. It seems to me to be a foreign matter altogether. I do not see the connection of ideas. I arrive, therefore, at the conclusion that there is not contained in the Act, either expressly or under any power to make a rule, any authority to do that which is to be done under rule 7 (1.). That rule contains a provision under which a particular period of time, namely, two weeks, is taken for the purpose of fixing the average actual earnings. That may be a perfectly reasonable period to take. It is for the tribunal which has to determine this average to say whether it is reasonable or not. The rule has fixed two weeks as being the proper period, and if it is not within the authority of the district board, which makes the rules, to specify that as the proper period, it seems to me that the rule is ultra vires. Some one must fix the proper period to take, and in default of some power given by the Act to any particular person to fix it, it must be fixed by the ordinary tribunals for determining questions of disputed rights. In case an action were brought by a workman affirming that he had been paid at a rate less than the minimum rate, in order to prove that that was so he would have to prove the rate of his actual earnings, and it would be for the judge of

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

Buckley L.J.

fact in that action to say what was a reasonable time over which to ascertain the rate of wages actually earned. The Act, in my opinion, gives no power to the joint district board to say that a fortnight is the proper time. I very much regret that that is so. It is eminently a matter which might well be determined under the Act, but unfortunately the Act has not provided the machinery for determining it. It follows, therefore, that rule 7 (1.) is ultra vires.

I have now to deal with the cross-appeal, and for this purpose it is necessary to consider more particularly s. 1, sub-s. 2, of the Act, to which I have already referred. That sub-section provides that the district rules "shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen . . . . and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work." Rule 5 purports to be made under the authority of that provision. The rule contains a provision, to which I will refer later, and concludes by saying that if any workman shall act in contravention of the rule he shall forfeit the right to wages at the minimum rate for the pay in which such contravention shall take place. As to this matter the Act has said that the district rules shall so provide, that is to say, shall impose that consequence, if the conditions as to regularity and efficiency of work are not complied with. The clause therefore at the end of rule 5 is valid if the preceding provision is a condition as to regularity and efficiency of the work. The particular provision is this. It contemplates a contingency, namely, the contingency that the workman in consequence of circumstances over which he alleges he has no control is unable to perform such an amount of work as would entitle him to a sum equal to the daily minimum rate; and the provision which is objected to is that he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged. The official has then to look into the matter and see whether he agrees with the workman or not, and if he does not agree with the workman the dispute is to be decided in the manner provided by rule 8, which is a rule for referring

disputes to certain persons. The question therefore is this: the workman alleges that he is placed under such conditions that he cannot earn wages at the minimum rate. Is it ultra vires to make it a condition for ensuring regularity and efficiency that he shall say to the official "These are the circumstances; they are such as prevent me from earning the minimum rate; come and see whether they are so or not"? To my mind that is intra vires. It is a condition, and a reasonable condition, to enable the employer to gauge and ascertain at the time at which the circumstances are said to be existing whether those circumstances are existing or not. It has nothing to do with the future. It is a provision that the workman shall give notice to the official at the time so as to enable the latter to see if the workman is justified in his statement. It is a proper ancillary or supplemental or incidental provision to enable the employer to see at the time whether or not the conditions as to regularity and efficiency are being observed. In my opinion rule 5 is valid.

The result is that the appellants succeed, not in the contention that rule 7 (1.) is intra vires, but in displacing the declaration made below and having a different one substituted for it; and as to the cross-appeal, it fails. The form of the order will be stated later.

KENNEDY L.J. I am of the same opinion. I will take rule 5 first. The learned judge in the Court below entertained apparently some doubt as to whether rule 5 was intra vires, that is to say, whether it was a rule which could properly be made under the provisions of the Coal Mines (Minimum Wage) Act, 1912. I agree with what Vaughan Williams L.J. has said. Sect. 1, sub-s. 2, contemplates that a workman shall forfeit his right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work. Rule 5 lays down a condition to which is annexed, if the condition is not fulfilled, the penalty which this sub-section authorizes. The question is whether that condition is one with respect to the regularity and efficiency of the work to be performed by the workman within the meaning of the sub-section. The condition requires a notice to be given forthwith to the official in charge of the district in which the workman

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

Kennedy L.J.

shall be engaged in case the workman in consequence of circumstances over which he alleges he has no control is unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate. It seems to me that the condition is one with respect to the regularity and efficiency of the work to be performed. I lay some stress upon the fact that the terms in the section describing the conditions are couched in the widest language—conditions with respect to the regularity and efficiency of the work to be performed. The class of work as to which the question may arise is work which, according to the evidence, can only be properly tested both as to the existence and as to the extent of the difficulties if there is at the time an opportunity given for inspection. It is as much in the workman's interest as in the interest of the employers that there should be means given for that inspection to be made at a time when the difficulties can be tested; because, while on the one hand it may prevent any claim of an unjustified nature being made by the workman, on the other hand it prevents the workman being placed in the unfortunate position at some subsequent time, when he cannot verify a perfectly honest and legitimate claim, of having that claim disputed, and thus being obliged to have recourse to such proceedings as may be open to him under the rules or otherwise for the purpose of establishing his claim. It is therefore, as it seems to me, a businesslike and reasonable provision, but, whether it is so or not, it is a rule which is not ultra vires as it lays down a condition with respect to regularity and efficiency of the work. In my opinion, having regard to the difficulties which may from time to time arise from the natural incidents of working in a coal mine owing to materials other than coal having to be cleared away by the miner, it is a condition which secures that the work shall be done efficiently and with regularity by requiring notice to the official in charge of the district. It is therefore a condition with respect to regularity and efficiency of the work.

I pass on to rule 7 (1.). To my mind this rule appears to raise a question which is not so easy as the other. I have felt in the course of the argument that, seeing that the Act in s. 2, sub-s. 1,

directs that the joint district board shall settle minimum rates of wages, and directs that in settling any minimum rate of wages the joint district board shall have regard to the average daily rate of wages paid to the workmen of the class for which the minimum rate is to be settled, it might be said with a certain degree of force that, in dealing with the question of ultra vires, when one finds a direction to settle the minimum rate of wages, and a further direction that in settling that minimum rate regard shall be had to the average daily rate of wages paid to the workmen, a rule which establishes the latter ought to be treated as necessarily incidental to the direction to settle the former, although the Act does not in terms direct the joint district board, or, in case of difference, the chairman, to settle how the average daily rate of wages paid to the workman is to be ascertained. Upon the whole, however, I think that it is better to take the view that we ought to construe strictly the power which has been entrusted by the Act to the joint district board, and there is nothing in the Act itself which directs that the joint district board shall settle how the average earnings of any workman are to be ascertained—whether they are to be ascertained by taking as the basis a day, or a week, or two or three weeks. Rule 7 (1.) purports to direct how those average earnings are to be ascertained.

The result is that, in some way, either, one hopes, by agreement, or failing agreement by arbitration or by some proceeding such as an action, the tribunal will have to determine as between the workman and the employer the proper method of ascertaining what the average earnings are. I can only say that we cannot uphold as being intra vires a rule which professes to state how those average earnings shall be ascertained.

Judgment accordingly.

The following was the form of the order as drawn up: "It is ordered that the said judgment be varied by striking out the declaration therein contained and substituting therefor the following declaration, namely: This Court without expressing any opinion as to how the rate is to be ascertained, but expressing the opinion that the district board constituted under the Coal

C. A. 1913

DAVIES v. GLAMORGAN COAL COMPANY, LIMITED.

Mines (Minimum Wage) Act, 1912, has not under that Act power to determine over what period the actual earnings of the workmen are to be taken for the purpose of determining the rate of such earnings and the deficiency, if any, of such rate below the minimum rate, doth declare rule 7 (1.) . . . . to be ultra vires, and the disputed portion of rule 5, which provides that 'If at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate, then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged,' to be intra vires."

Solicitors for plaintiffs: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & Jenkins, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1913
Oct. 29, 30;
Dec. 19.

VACUUM OIL COMPANY, LIMITED *v.* ELLIS. ELLISON, CLAIMANT; HOWARD, GARNISHEE.

Mortgage—Second Mortgage—Mortgaged Property let to Tenant—Rent due from Tenant—Receiver appointed by Second Mortgagee—No Notice to Tenant of Appointment of Receiver—No Claim by Receiver to Rent—Judgment Creditor of Mortgagor—Garnishee Order attaching Rent due—Priority.

Land in the occupation of a tenant at a rent was in 1908 with other properties mortgaged by the owner thereof to a second mortgagee, subject to a first mortgage. In March, 1911, the first mortgage became vested in the tenant, who at the same time received notice of the second mortgage. In April, 1911, the second mortgagee, under the Conveyancing Act, 1881, appointed a receiver of the properties comprised in his mortgage, and notice of the appointment was given to the mortgagor. The second mortgagee instructed the receiver to take no steps without further instructions. The receiver accordingly took no further steps and no further instructions were ever in fact given to him. No notice of the appointment was either then or at any subsequent time given to the tenant. In July, 1911, the plaintiffs recovered judgment against the mortgagor in the county court for a sum of money, and on March 25, 1912, the judgment being unsatisfied, the plaintiffs served a garnishee summons in the county court on the tenant to shew cause why he should not pay to them the half-year's rent due from him on that date. On March 28, 1912, the second mortgagee served notice on the tenant to pay the rent to him. The receiver did not demand payment of the rent from the tenant, nor was he a party to the garnishee proceedings. The tenant, after deducting the interest due to him upon his mortgage, paid the balance of the rent into Court:—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that the notice by the second mortgagee to the tenant to pay the rent to him was inoperative, and that the plaintiffs were entitled as against the second mortgagee to the balance of the rent due from the tenant.

APPEAL from the decision of a Divisional Court (Ridley and Lush JJ.) reversing an order of the county court of Hertfordshire holden at Royston. (1)

(1) When the case was before the Divisional Court, upon the suggestion of the Court a statement of facts was agreed upon by the parties, the Court being of opinion that the evidence before the county court judge was not sufficient to enable them to determine the case.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

On May 23, 1908, there was subsisting a first mortgage in favour of Nutt and others over a farm at Meldreth, in Cambridgeshire, of which the defendant, Mrs. Ellis, was the owner, and which was in the occupation of one Howard as her tenant, and over certain other properties belonging to the defendant's husband, to secure repayment of 2000*l.* with interest thereon at the rate of 4½ per cent. per annum. On that date the defendant and her husband executed a deed by way of second mortgage, by which the defendant conveyed to Ellison, the claimant, the said farm at Meldreth, in the occupation of Howard, and the defendant's husband conveyed to Ellison certain property belonging to him, in each case subject to the above-mentioned first mortgage, to secure the repayment of 1950*l.* with interest thereon at the rate of 6 per cent. per annum. Notice in writing of this mortgage was given to the first mortgagees. On March 13, 1911, the first mortgage of the farm in the occupation of Howard was by deed transferred to him by the mortgagees, and at the same time the notice of the second mortgage was handed to him. On April 24, 1911, the above-mentioned sum of 1950*l.* being unpaid, and interest under the mortgage being in arrear for more than two months, Ellison, in pursuance of the power given by s. 24 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and all other powers (if any), by deed appointed one Elworthy to be the receiver of the rents, profits, and income of the land included in the second mortgage with all the powers conferred on a receiver by the said Act, and to the intent that he should apply all the moneys received by him in the manner directed by sub-s. 8 of s. 24 of the Act. The deed appointing Elworthy the receiver was sent by Ellison to him on April 24, 1911, and by letters of the same date Elworthy gave notice to the defendant and her husband of his appointment as receiver. At an interview on April 25, 1911, between Ellison, Elworthy, and Mr. and Mrs. Ellis, Mr. Ellis said that he had great hopes of selling certain cement works and other property included in the mortgage, and that it would be detrimental to such prospective sale if a receiver were known to be in possession, and Ellison thereupon instructed Elworthy to take no steps without further instructions. So far as the farm let to Howard was concerned,

Elworthy, acting upon the instructions above mentioned, took no further steps as receiver, no further instructions were ever given to him, and he never claimed rent from Howard, nor did Howard receive notice of the appointment of a receiver.

On July 10, 1911, the plaintiffs recovered judgment against the defendant in the Westminster County Court for a sum of money. On March 25, 1912, a half-year's rent for the farm became due from Howard, and after crediting himself with the interest due to him upon his mortgage there remained a sum due from him in respect of the rent. The judgment debt due to the plaintiffs being unsatisfied, on March 25, 1912, a garnishee summons in the Royston County Court was issued at the instance of the plaintiffs calling upon Howard to shew cause why he should not pay the amount due from him for rent to the plaintiffs. On March 28, 1912, Ellison's solicitors wrote the following letter to Howard:—"We beg to enclose notice from the mortgagee, who is in possession and to whom is owing considerable arrears of interest, to pay your half year's rent amounting to 34*l.*, less any outgoings you have paid, to us on or before Saturday next. We do not desire to distrain for the rent, but we may be compelled to do so after Saturday in view of the present circumstances." The notice enclosed, which was dated March 28, 1912, and signed by the claimant, Ellison, and addressed to Howard, was as follows:—"I, Sidney F. Ellison, of Cambridge, solicitor, do hereby give you notice that I have become entitled as mortgagee by virtue of an indenture dated the 23rd day of May, 1908, and made between Hubart Oslar Shepherd Ellis, of the first part, Emily Vere Ellis, of the second part, and the said S. F. Ellison, of the third part, to the receipt of the rent of the Homestead land and buildings situate in Chiswick End and High Street, Meldreth, in the county of Cambridge, now held by you . . . . and I require you to pay to me the half year's rent due 25th March last and all rent henceforth to become due in respect thereof." Howard thereupon on April 4, 1912, paid into Court the sum of 18*l.* 16*s.* 3*d.*, being the balance of the amount due from him for rent, with a statement that the sum sought to be attached under the garnishee summons was claimed by Ellison under the above notice, and the latter was ordered to appear and support his claim.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

At the hearing on April 17, 1912, in the county court, Elworthy, the receiver, did not appear nor did he make any claim. The county court judge held that the plaintiffs were entitled to the sum in Court as against Ellison, and ordered that it should be paid out to them. The Divisional Court reversed this order and directed the sum to be paid to Ellison. The plaintiffs by leave appealed.

R. Bankes, *K.C.*, and *F. E. Bray*, for the plaintiffs. Ellison has not made out that he is entitled to this rent. It is clear law that an equitable mortgagee acquires no right to the rent from the tenant by merely giving the latter notice to pay the rent to him: Fisher on Mortgages, 6th ed., p. 877, s. 1727; *Finck* v. *Tranter*. (1) Ellison, as the equitable mortgagee, appointed a receiver, and the receiver might have given Howard notice to pay the rent to him. He did not do so. On the contrary he arranged with the defendant and her husband that the receiver should do nothing, and the receiver accordingly took no steps in the matter. The effect was that the receiver did not take possession. The appointment of the receiver was treated as a nullity. No notice of the appointment was given to Howard, and no demand was ever made by the receiver upon Howard for the rent. On March 25, 1912, Howard could have paid the defendant the rent then due and obtained a discharge from her but for the garnishee order. There would have been no breach of obligation towards the receiver. The plaintiffs therefore are entitled under the garnishee order to the money in Court.

A. Grant, *K.C.*, and *W. C. Bernard*, for the claimant. The mortgage to the claimant gave him an equitable right to receive the rent due from the tenant. The mortgagor could not give the judgment creditors any higher right than she had herself, and could not therefore give them a right to receive the rent in priority to the equitable mortgagee. A garnishee order only binds so much of the debt owing to the judgment debtor from a third party as the judgment debtor can honestly deal with at the time the garnishee order nisi is obtained and served, and consequently it is postponed to a prior equitable assignment of the debt: *In re*

(1) [1905] 1 K. B. 427.

General Horticultural Co., Ex parte Whitehouse. (1) A garnishee order does not create, as between garnishor and garnishee, any debt either at law or in equity—*In re Combined Weighing and Advertising Machine Co.* (2)—and the right of a garnishor is subject to such rights and equities as already exist: *Norton* v. *Yates* (3); and this is so even though the garnishee order has been made absolute: *Cairney* v. *Back.* (4)

A garnishee order only gives the garnishor certain statutory rights, which are subject to all equitable rights. The garnishor therefore takes subject to prior assignments. A creditor can only attach by a garnishee order such property of the debtor as the latter can properly deal with, and therefore an equitable charge obtained before a garnishee order takes priority of the order, even where no notice of the charge is given: *Badeley* v. *Consolidated Bank.* (5) He is prior tempore and therefore potior jure. *Geisse* v. *Taylor* (6) is a strong case because the debt for which the security was given was incurred by the garnishee after the garnishee order absolute, and yet it was held that the garnishor had no priority. Apart therefore from the appointment of the receiver Ellison, as equitable mortgagee, had a better title to the rent due from Howard than the garnishors, and he gave due notice to Howard to pay the rent to him. Secondly, a receiver having been appointed the mortgagor could only give a receipt for the rent due from Howard as agent of the receiver. The appointment of a receiver takes away the right of the mortgagor to receive the rents of the mortgaged property: s. 24 of the Conveyancing Act, 1881; *Bayly* v. *Went.* (7) The cases of *Robson* v. *Smith* (8) and *Evans* v. *Rival Granite Quarries* (9) relate to debentures which constitute a floating security over the undertaking and assets of the company, and in such a case the company has a right to carry on its business. In such a case a judgment creditor can attach a debt due to the company so long as the security has not crystallized into a fixed

(1) (1886) 32 Ch. D. 512.
(2) (1889) 43 Ch. D. 99.
(3) [1906] 1 K. B. 112.
(4) [1906] 2 K. B. 746.
(5) (1888) 38 Ch. D. 238.
(6) [1905] 2 K. B. 658.
(7) (1884) 51 L. T. 764.
(8) [1895] 2 Ch. 118.
(9) [1910] 2 K. B. 979.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

security. If, however, a receiver is appointed, that alone is sufficient to crystallize the security. The company is from that moment deprived of the power of carrying on its business and of giving receipts for money. So in the present case the appointment of a receiver takes away the right of the mortgagor to deal with the rent due from Howard or to give a receipt for it. Thirdly, Howard was first mortgagee and tenant in occupation of the farm. He was therefore in possession, and he paid himself out of the rent the interest due on his mortgage. He retained the rent against the interest on his mortgage. Howard was really mortgagee in possession, and that being so he could not pay his rent to the mortgagor. He took possession for all who were interested in the equity of redemption and must account to them: *Maddocks* v. *Wren* (1); *Berney* v. *Sewell* (2); Fisher on Mortgages, 6th ed., p. 884, s. 1749. Howard had notice of the claimant's mortgage and could not have paid the rent to the defendant, and the latter could not give any one the right to receive it. The order of the Divisional Court was therefore right.

R. Bankes, K.C., in reply. Howard was not in possession as first mortgagee; he was in possession as tenant, and paid himself the interest due on his mortgage out of his rent before handing the balance to the defendant. He did not incur the risks of a mortgagee in possession. The dicta of Walton J. in *Cairney* v. *Back* (3) are too wide, and in *Evans* v. *Rival Granite Quarries* (4) Fletcher Moulton L.J. said that that case contained dicta which he could not reconcile with the law. The mere appointment of a receiver does not alter the rights of the parties: *In re Metropolitan Amalgamated Estates.* (5)

Cur. adv. vult.

Dec. 19. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case I assume the fact to be that Howard was in possession as tenant, and not as first mortgagee, and that if he had paid the rent due to the mortgagor, who was also lessor of

(1) (1680) 2 Rep. Ch. 109.
(2) (1820) 1 Jac. & W. 647.
(3) [1906] 2 K. B. 746, at p. 751.
(4) [1910] 2 K. B. 979, at p. 997.
(5) [1912] 2 Ch. 497.

the premises to Howard, he could get a good discharge from the mortgagor receiving the rent. And I assume that, if Howard had received notice of the equitable mortgage of Ellison, he could, notwithstanding such notice, have still paid the mortgagor and got a valid discharge. The fact is, however, that he did not pay the mortgagor, and the question arises whether under these circumstances the second mortgagee can now take such steps as would prevent the rent payable to the mortgagor being paid to the judgment creditors, who have obtained the garnishee order. It will be observed that Mrs. Ellis, the mortgagor, is not a party to the interpleader issue; that issue is an issue as between the judgment creditors and Mr. Ellison as second mortgagee.

I do not think that it is argued that the second mortgagee could not by the appointment of a receiver under the Conveyancing Act, coupled with notice thereof to the tenant, prevent the tenant paying the rent to his lessor, but it is said that no such notice was given in this case to Howard as tenant; and the question which arises in this case is whether the fact that the second mortgagee has, and at the time of the making of the garnishee order had, the right to give such a notice is sufficient to give Ellison, the second mortgagee, a title sufficient to give him priority over the judgment creditors. I think that the receiver could have given a notice to the tenant sufficient to prevent the tenant getting a good discharge from the lessor on payment of the rent to her, and that the second mortgagee could personally give notice to the tenant of the actual appointment of the receiver, and that in such case the judgment creditors would fail on the present issue.

It seems to me that the answer to the question is to be found in the judgment of Erle J. in *Watts* v. *Porter* (1), who says: "Upon this rule the question raised was whether the order of a judge charging stock, standing in the name of a trustee in trust for the judgment debtor, with a judgment debt, gave priority to the judgment creditor over a prior mortgagee of this stock; the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. The

(1) (1854) 3 E. & B. 743, at p. 758.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Vaughan Williams L.J.

answer depends upon stat. 1 & 2 Vict. c. 110, s. 14, giving to a judgment creditor with a charging order all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. For the affirmative it was contended that if the creditor had received a charge from the debtor, and had given notice of it to the trustee, without having notice of the mortgage, he would have had priority over the mortgagee; and that the giving of such notice was a remedy he would have been entitled to; therefore a judgment creditor with a charging order is said to be entitled to the same remedy. For the negative it was contended that the remedies intended by the statute were remedies against the debtor, which would make his interest in the stock available for payment of the debt, and which would arise upon a lawful charge made by him in favour of the creditor. The debtor's interest only is charged; for the condition in the statute for the charge is that there should be stock standing in the name of a trustee in trust for the debtor; now, if the debtor has already assigned the stock, without notice to the trustee, it is not standing in trust for him, but in trust for the assignee, at least as between these parties. The assignee could at any time compel the trustee to transfer the stock to him; and neither the debtor nor the trustee could resist the claim of such assignee on the ground that he had given no notice to the trustee; and what is true of an assignment of the whole stock is true of a partial charge thereon. It is admitted that this would be the effect of the charging order upon stock standing in the debtor's name, and equitably mortgaged by him before the charging order. The equitable mortgagee would have priority; for the debtor would be trustee of the stock for him, and the stock would not be standing in his name on his own behalf. It is not probable that the Legislature intended to give a greater effect to the order upon stock standing in the name of a trustee than it would have upon stock standing in the debtor's name. Also the charge intended by the statute must be taken to be a lawful charge; for it is not to be supposed that the Legislature intended to force the debtor into the situation of a breaker of the law. Now if the debtor made a lawful charge on stock, he would either specify his interest therein or charge it subject to outstanding

C. A.
1913
VACUUM OIL COMPANY, LIMITED v. ELLIS.
Vaughan Williams L.J.

incumbrances. The compulsory charge by a judgment creditor is analogous to a charge expressed to be on such interest as the debtor might have; and, if worded in that way, the charge would give no right, beyond what the debtor had, as a charge so worded seems to be notice to the creditor taking it to inquire."

Sect. 14 of 1 & 2 Vict. c. 110 is a section enacting that stock and shares in public funds and public companies belonging to the debtor and standing in his name shall be charged by order of the judge, and does not differ in effect from the corresponding section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and this is recognized by the judgment of the Court in *Pickering* v. *Ilfracombe Ry. Co.* (1), where the Court adopted the opinion of Erle J. and not the view of the majority in *Watts* v. *Porter* (2); and the same Court actually decided in the case of *Robinson* v. *Nesbitt* (3) in favour of that opinion. In *Pickering* v. *Ilfracombe Ry. Co.* (1) Willes J. in the course of his judgment says (4): "The last point which has been raised is that Lord Poltimore had no notice of the assignment; that was based on this, that the garnishee clauses of the Common Law Procedure Act, 1854, intended that a creditor should have something more than what the debtor was entitled to, so that a creditor without any special lien on the call should have some particular right other than that which he would have under his execution; but, as pointed out by Mr. Mellish, there is no such language in that statute. It was because there was some such language as that in 1 & 2 Vict. c. 110, s. 14, that the majority of the Court of Queen's Bench in *Watts* v. *Porter* (2) made the exception in favour of the judgment creditor in that case, though whether that exception was right is, as it would seem from the subsequent case in the Court of Chancery of *Beavan* v. *Lord Oxford* (5), open to grave doubt. It is enough in the present case to say that there is nothing in the Common Law Procedure Acts to warrant such a construction, and that the defendants have failed to shew that the present case comes within anything more than

(1) (1868) L. R. 3 C. P. 235.
(2) 3 E. & B. 743.
(3) (1868) L. R. 3 C. P. 264.
(4) The Lord Justice was quoting from the report in 37 L. J. (C.P.) 118, at p. 123.
(5) (1856) 6 D. M. & G. 507.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Vaughan Williams L.J.

the ordinary rule as to the rights of an execution creditor against the property of his debtor. I concur, therefore, in thinking the plaintiffs are entitled to our judgment." It is to be observed that in this case, in which Willes J. delivered judgment, Lord Poltimore was a shareholder liable to pay certain calls to the company, and that the company, having to raise money, assigned the amount due on the calls, including the call payable by Lord Poltimore, as security for the advance they were obtaining, and it was not proved that Lord Poltimore had notice of such assignment, just as Howard had no notice of the appointment of a receiver, and it was under these circumstances and on this assumption that the Court of Common Pleas, taking the same view as Willes J., held that even so the debt due by Lord Poltimore to the company, having been assigned by the latter, was not attachable.

Davis v. *Freethy* (1) is a case in which there was an assignment with a covenant for assurance, but before effect could be given to the covenant the garnishee order had intervened; but even so it was held, following the principle laid down in *In re General Horticultural Co., Ex parte Whitehouse* (2) and *Badeley* v. *Consolidated Bank* (3), that "were we to decide in favour of the garnishee we should be handing over to him property with which the debtor, in view of the covenant he has entered into, could not honestly deal." (4)

The true test to apply is, could the person, the debt due to whom is said to have been charged by the garnishee order, have given a charge over the debt, in this case the rent due from Howard to Mrs. Ellis? For the reasons given in the judgments which I have cited she clearly could not do so, and therefore, as held by those Courts, the garnishee order cannot extend to rents receivable by her which she has already charged by the second mortgage and the contract contained therein.

Neither the fact that there is a receiver who has not intervened, nor the fact that such receiver has given no notice to the tenant liable to the rent, to my mind affects the question at all. In my opinion the balance of the rents, after discharging the

(1) (1890) 24 Q. B. D. 519.
(2) 32 Ch. D. 512.
(3) 38 Ch. D. 238.
(4) 24 Q. B. D. at pp. 522, 523.

present claims of the first mortgagee, were by contract between Mrs. Ellis and Mr. Ellison made subject to a mortgage in favour of the latter; and in my opinion if Mrs. Ellis had made a third mortgage and not mentioned the second mortgage she would have been guilty of fraud.

I think that this appeal should be dismissed.

BUCKLEY L.J. read the following judgment:—In the absence of express contract between mortgagor and second mortgagee of lands entitling the latter to take possession with the consequential right to take the rents, the rights of the second mortgagee are as follows. He can, subject to the rights of the first mortgagee, take possession and enter into receipt of the rents in either one of two ways: (*a*) in an action to enforce his security he can obtain an order appointing a receiver; or (*b*) under the Conveyancing Act he can himself appoint a receiver. In the one case he obtains judicially and in the other contractually and by virtue of the statute a right to take the rents by the hand of a receiver. But his only remedy is the appointment of a receiver; he has no legal right to take possession or to demand payment to himself of the rents. If he serves notice on the tenant requiring the tenant to pay the rent to him, the tenant may refuse payment, for he will get no discharge. The second mortgagee could not sue the tenant for the rent. He has no legal right in the land demised. These propositions will be found to dispose of this case. The respondent's counsel have discussed a number of questions which, in my judgment, do not arise. When the facts are stated, the point for decision lies in a very small compass.

The case comes before us under singular circumstances. To the facts as found by the county court judge are to be added the facts as appearing in a statement agreed, under circumstances into which I need not enter, for the purposes of the appeal to the Divisional Court. The facts as thus ascertained are as follows: On May 23, 1908, Mrs. Ellis granted to Mr. Ellison a mortgage of certain lands subject to a then existing legal incumbrance in favour of Charles Alfred Nutt and others. Notice was duly given by the second mortgagee to the first mortgagees.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Buckley L.J.

The tenant of the mortgaged premises was one Howard. On March 13, 1911, the first mortgage was transferred to Howard, the tenant. In April, 1911, Ellison, the second mortgagee, was minded to appoint a receiver under the power so to do contained in the Conveyancing Act. On April 24, 1911, he executed a deed appointing Mr. Elworthy receiver, and on the same day Mrs. Ellis, the mortgagor, was acquainted with the fact that the receiver had been appointed. The execution of the deed was not communicated to Howard, the tenant, and no notice was ever given to him by Mr. Elworthy, the receiver. The reason for this was as follows: On April 25 there was a meeting at which, amongst others, Mr. Ellison, the mortgagee, and Mr. Elworthy, the receiver, were present. Ellison, the mortgagee, then instructed Elworthy, the receiver, to take no further steps without further instructions, as it would be detrimental to a then prospective sale of some of the property if a receiver were known to be in possession. Under these circumstances Howard was never informed of the appointment of a receiver, no instructions were ever given to Elworthy to take further steps, and Elworthy in fact never gave any notice to Howard. Rent fell due in September, 1911, but was not, nor was the rent falling due in March, 1912, claimed by the receiver. On July 10, 1911, the present plaintiffs, the Vacuum Oil Company, obtained judgment against Mrs. Ellis. The judgment remained unsatisfied. On March 25, 1912, a half-year's rent became due from Howard, and of that rent 18*l.* 16*s.* 3*d.* has been paid into Court under the circumstances presently mentioned. The question is, who is entitled to that sum? On the same March 25 the plaintiffs in this action obtained upon the affidavit of a Mr. H. C. Hardy, their solicitor, an order of the county court for leave to summon Howard, the tenant, as garnishee with a view to obtain payment to the plaintiffs of the amount of the debt due from Howard to Mrs. Ellis (County Court Rules, Order xxvi., r. 1). On March 28 the mortgagee (but not the receiver) gave notice to the tenant requiring the tenant to pay to him, the mortgagee, the half-year's rent due March 25. The notice was enclosed in a letter from the mortgagee's solicitors stating that the mortgagee "is in possession." Inasmuch as the

receiver had never given notice, the mortgagee was not in possession by the receiver. Neither was the mortgagee nor could he be in possession in his own person. On April 4 the garnishee, Howard, gave notice that he paid into Court the 18*l.* 16*s.* 3*d.*, and gave notice to the Court that Ellison claimed the amount under the notice dated March 28. On April 17 the county court judge ordered the 18*l.* 16s. 3*d.* to be paid out of Court to the plaintiffs. The Divisional Court set aside that order and entered judgment for Mr. Ellison with costs, and ordered payment of the 18*l.* 16*s.* 3*d.* to him. From that order this appeal is brought to us. The question therefore is not whether the receiver having given notice to the tenant is entitled to the money, for he never gave notice, but whether the mortgagee who on March 28 gave notice to the tenant is entitled to the sum in competition with the judgment creditors claiming under the order of March 25. In my opinion the judgment creditors are entitled to the money.

The parties before the county court judge and before this Court are the judgment creditors, the judgment debtor, the second mortgagee, and Howard the tenant. The receiver is no party and was never claimant. At the moment when the matter was before the county court judge for decision no notice had been given by the receiver or by any one of the appointment of the receiver. No notice by the receiver has in fact been given up to the present moment. The mortgagee had on March 28 given a notice which was inconsistent with any such action by the receiver. As between Ellison and Mrs. Ellis it is unnecessary to say whether any rights arose by reason of Ellison's notice of March 28. The question is whether before the county court judge gave judgment on April 17 anything had been done which, as between Howard and Mrs. Ellis or as between Howard and the plaintiffs, holders of the garnishee order, relieved Howard of the obligation to pay Mrs. Ellis or the plaintiffs, if they required payment from him. If after that notice Howard had paid Mrs. Ellis or after the garnishee order had paid the plaintiffs, could he have obtained a discharge or would he have been liable to pay over again to Ellison? In my opinion he would have been compellable to pay those parties or one of them, and they could give a discharge, and Ellison could not have required him to pay.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Buckley L.J.

Ellison's counsel have argued that the debt was not due to Mrs. Ellis but to the receiver, Elworthy. It was not. The receiver had never given notice. He could not claim. Ellison had given a notice which he had no right to give. He could not claim. The result is that the plaintiffs are entitled.

A further point was raised which I mention only to shew that I have not overlooked it. Howard, the tenant, was himself by transfer entitled to the first mortgage. It was suggested that he was under those circumstances mortgagee in possession, that the second mortgagee was entitled to call upon him to account, and that the notice of March 28 was a good notice to him as mortgagee in possession. The contention that from the facts it results that he was mortgagee in possession seems to me unsound, and if it were sound the notice was addressed to him, not as mortgagee, but as tenant owing rent. There is, I think, nothing in the point. In my opinion the appeal must be allowed, the order of the Divisional Court be discharged, and that of the county court judge restored, with costs here and in the county court and Divisional Court.

KENNEDY L.J. read the following judgment:—The material facts in this somewhat curious case, as I understand them, are as follows. Mrs. Ellis, the owner of a farm at Meldreth, in Cambridgeshire, in the occupation of one Howard as tenant, mortgaged it together with certain other properties by deed dated May 23, 1908, to Sidney Frederick Ellison to secure repayment to him of 1950*l.* with interest thereon. There was subsisting at the time an earlier mortgage upon the same property in favour of persons of the names of Nutt and Ruston, and this first mortgage was, on March 13, 1911, transferred by deed to Howard, the tenant of the property, and on that date Howard received written notice of the execution of the second mortgage to Ellison. On April 24, 1911, Ellison by deed appointed one Elworthy receiver of this and the other properties comprised in the second mortgage, and on April 25, 1911, Mrs. Ellis, the mortgagor, received notice of this appointment. Howard never had notice of this appointment. At an interview at which Mrs. Ellis and her husband Mr. Ellis (who was

interested in some of the other mortgaged properties and was in respect of them a party to the second mortgage deed, but had no interest in the property occupied by Howard) were present Mr. Ellis represented that it would be detrimental to a sale, then in prospect, of some of such other properties if a receiver were known to be in possession, and thereupon Ellison instructed Elworthy to take no steps without further instructions; and so far as the property occupied by Howard was concerned Ellison never gave Elworthy any further instructions, and Elworthy in fact never took any steps. On July 10, 1911, the Vacuum Oil Company, the appellants in the present appeal, obtained judgment against Mrs. Ellis for an amount which does not appear, but which exceeded 18*l.* 16*s.* 3*d.* On March 25, 1912, the present appellants, in order to procure payment of the judgment debt, issued out of the county court a garnishee summons against Howard, claiming payment of the rent due from him on that day as tenant to Mrs. Ellis, the judgment debtor. On March 28, 1912, Ellison's solicitors wrote to Howard claiming payment to them on Ellison's behalf of "your half-year's rent amounting to 34*l.*," and enclosing a formal notice. The letter and notice were in the following terms. [His Lordship read the letter and notice.] On April 4 following Howard's solicitor paid into the county court 18*l.* 16*s.* 3*d.*, being the amount of the rent due from him less the interest due to him as mortgagee and a small sum for expenses, and gave notice in the proper form of the payment and of Ellison's claim to the registrar of the county court and to the judgment creditors. The summons was heard by the learned county court judge on April 17, 1912. There appeared before him counsel for the judgment creditors (the present appellants), counsel for the claimant Ellison, and counsel for the judgment debtor, Mrs. Ellis. Elworthy, the receiver, did not appear by himself or by counsel. The learned county court judge decided in favour of the appellants (the judgment creditors) and against Ellison (the claimant), and ordered that the sum of 18*l.* 16*s.* 3*d.* paid into Court by the garnishee should be paid out to the appellants. Ellison appealed to the Divisional Court. In the course of the hearing the Divisional Court intimated their opinion that the evidence before the county court judge was

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Kennedy L.J.

too meagre and that a new trial should be ordered unless the litigants could agree upon a statement of facts. A written statement of facts was thereupon agreed, and upon that statement of facts, from which I have taken the history of the case, the Divisional Court gave judgment in favour of Ellison, reversing the judgment of the county court judge; and it is from that judgment that the present appeal has been brought.

I am of opinion that the judgment of the Divisional Court ought to be reversed. Ellison, as I have stated, had appointed Elworthy as receiver on April 24, 1911. But almost immediately, at the instance of Mr. and Mrs. Ellis, he had instructed Elworthy to take no steps without further instructions; no notice of the appointment of a receiver was ever given by any one to Howard; no claim for payment of rent as it fell due in 1911 was made either by Ellison or by Elworthy; the claim made on March 28, 1912, in respect of the Lady Day rent, after the issue of the garnishee summons, was made by Ellison's solicitors for payment to them, not on behalf of the receiver, but on behalf of Ellison; and the receiver neither has ever made any claim or demand upon Howard nor was a party to the county court proceedings. Ellison, as second mortgagee, neither did nor could take possession, except through a receiver, and of course subject to the rights of the first mortgagee. Nor could he direct a tenant of the mortgaged property to pay rent to him or sue him for the rent when due; although, if the tenant has paid the rent to him, an equitable mortgagee cannot be compelled to refund it to the tenant: *Finck* v. *Tranter*.(1) The demand therefore of the second mortgagee on March 28, 1912, was inoperative. Elworthy, the receiver, as I have already said, has never given any notice to Howard, never made any demand for rent, and is no party to the present proceedings as a claimant. In my opinion, at the date of the county court judge's order, supposing there had been no garnishee proceedings, Howard could have discharged himself of his liability in respect of rent by paying it to Mrs. Ellis, the mortgagor. The intervention of the judgment creditors displaced Mrs. Ellis's right to receive it as between her and them, and, as between the latter

(1) [1905] 1 K. B. 427.

and the second mortgagee, the second mortgagee cannot, in my view, set up any title in himself, for he could never claim payment to himself, or in the receiver, who has never either given notice to the tenant or claimed payment up to this day. I think that this appeal must be allowed.

C. A. 1913

VACUUM OIL COMPANY, LIMITED v. ELLIS.

Appeal allowed.

Solicitors for plaintiffs: *Kerly, Sons & Karuth.*

Solicitors for claimant: *Jordan & Lavington, for Ellison & Co., Cambridge.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A. 1913 *Dec.* 3, 10.

FURTADO *v.* CITY OF LONDON BREWERY COMPANY.

Revenue—Income Tax—Assessment of Profits under Schedule (D)—Deprivation of Profits on which Computation made—Application to Commissioners for Relief—Power to state a Case—Appeal—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 134—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59.

An application to the Commissioners for General Purposes under s. 134 of the Income Tax Act, 1842, for the amendment of an assessment of profits, upon the ground that during the year of assessment the applicant has been deprived of or lost the profits or gains on which the computation of duty charged in the assessment was made, is not "an appeal" under the Income Tax Acts and is not within s. 59 of the Taxes Management Act, 1880, and consequently the Commissioners have no power to state a case under that section for the opinion of the High Court.

Decision of Scrutton J. (ante, p. 152) affirmed.

APPEAL from a decision of Scrutton J., reported ante, p. 152, where the facts are fully stated.

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the appellant. The Commissioners have found that the appellant had suffered a loss from a "specific cause" within s. 134 of the Income Tax Act, 1842, and the appellant is entitled under s. 59 of the Taxes Management Act, 1880, to appeal by way of special case from that decision. It is not suggested that any other mode of appealing is open to him. It is said that an application under s. 134 is not an appeal against the assessment, for it assumes that the statement was right at the time when it was made and only asks to

C. A. 1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

have it amended in consequence of something which has happened since; and that as under s. 59 of the Act of 1880 the power to state a case only arises "upon the determination of any appeal" the Commissioners had no power to state a case. The appellant contends that an application under s. 134 of the Act of 1842 is an "appeal" to the Commissioners. It is one of a series of sections relating to appeals, and proceedings under it constitute an appeal within s. 118. By s. 122 the Commissioners can alter the assessment. Sect. 130 speaks of applications to the Commissioners as appeals. It is said that *Grimes* v. *Lethem* (1) is an authority against this contention, but that case was decided on s. 23 of the Customs and Inland Revenue Act, 1890, and does not touch this point. A certificate under s. 133 (since repealed) of the Act of 1842 that the applicant has paid too much is appealable: *Russell* v. *North of Scotland Bank.* (2) *Bruce* v. *Burton* (3) turned upon the construction of s. 27 of the Finance Act, 1896. The result of those cases is that in order to make out a right to have a case stated the appellant must shew that the assessment has been called in question by way of appeal; and he does so in this case. Sects. 133 and 134 of the Act of 1842 are the only sections to which s. 118 can refer. The last paragraph of s. 164 shews that these applications are appeals.

Ryde, K.C., and *Bremner*, for the respondents. The only question is whether a certain step in the proceedings is an "appeal." That the result of it would be the same as the result of an appeal is immaterial. The question is what has the litigant done. To constitute an appeal there must be something which he says is wrong and desires to have put right. Here the assessment is not disputed, so this is clearly not an appeal in the ordinary sense. The Income Tax Acts assume that the income of the last three years will be the same as that of the next year. Then it is provided that if that should turn out to be wrong relief can be obtained, but the assessment is accurate and is not found fault with. Sect. 118 deals with appeals only; it does not give a right to appeal in this case and does not apply to applications under s. 134. A proceeding may be made an

(1) (1898) 3 Tax Cases, 622.
(2) (1891) 3 Tax Cases, 14; 28 Sc. L. R. 389; 18 R. 543.
(3) (1901) 4 Tax Cases, 399.

appeal which is not in itself an appeal, but it requires a positive enactment for that purpose. That was done by s. 164 in the case of persons who claim exemption. Under s. 23 of the Act of 1890 persons who have suffered losses in trade may apply for relief, and s. 27 of the Finance Act, 1907, says to whom they may apply; but they are not appellants. Sect. 30 of the Income Tax Act, 1853, shews that the Legislature regarded applications under ss. 133 and 134 of the Act of 1842 as being applications for amendment and not as being appeals.

Sect. 118 of the Act of 1842 is not an operative section to give any right of appeal in a case like this, and but for s. 164 there could be no suggestion that this was an appeal.

Russell v. *North of Scotland Bank* (1) is a very unsatisfactory case. The arguments of counsel were not dealt with by the Court, and the judgments do not touch this question. If the appellant relies upon that case as an authority he must shew that it decided this particular question. A question cannot be held to have been decided unless it was not merely presented in argument but was also present to the mind of the Court when giving judgment: *Kydd* v. *Watch Committee of City of Liverpool.* (2)

In *Bruce* v. *Burton* (3), a case under s. 27 of the Finance Act, 1896, and s. 23 of the Customs and Inland Revenue Act, 1890, both of which sections are in pari materia with the section now before the Court, it was held that the application to the Commissioners for a return of the tax overpaid was not an appeal and that they consequently had no power to state a case under the Act of 1880; and in *Grimes* v. *Lethem* (4) there is a dictum to a like effect upon s. 23 of the Customs and Inland Revenue Act, 1890.

The rule of law is that although a certiorari lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute, and a right of appeal cannot be given by implication: *Rex* v. *Hanson* (5); *Reg.* v. *Stock.* (6) The most

(1) 3 Tax Cases, 14; 28 Sc. L. R. 389; 18 R. 543.
(2) [1908] A. C. 327.
(3) 4 Tax Cases, 399.
(4) 3 Tax Cases, 622.
(5) (1821) 4 B. & Ald. 519.
(6) (1838) 8 Ad. & E. 405.

C. A. 1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

that the appellant can say in this case is that under s. 118 there is by implication a right of appeal, and that, according to the authorities cited, is not enough.

Sir S. O. Buckmaster, S.-G., in reply. Sect. 118 shews expressly that appeals within the meaning of the Act include applications like this; there is no implication necessary. An application for exemption, although not an application in the general nature of an appeal, is an appeal within s. 164. Sect. 118 deals generally with appeals, and the later part of the section shews that such an application as this is, within the meaning of that section, an appeal.

Cur. adv. vult.

On December 10 the judgment of the COURT (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.) was delivered by

SWINFEN EADY L.J. The question raised by this appeal is whether the decision of the Commissioners for General Purposes on an application by the respondents under s. 134 of the Income Tax Act, 1842, is final and conclusive, or whether a right of appeal exists by way of case stated for the opinion of the High Court of Justice.

The rule of law is that although a certiorari lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute: *Rex* v. *Hanson*. (1)

The Commissioners for General Purposes decided that the company were entitled to the relief claimed. The burden is on the appellant, the surveyor of taxes, to establish that a right of appeal exists.

By the Income Tax Act, 1842, s. 118, a right of appeal is given to any person thinking himself aggrieved by any assessment, provided it is brought within the time limited. On such an appeal, the appellant disputes the validity of the assessment.

By ss. 133 (since repealed) and 134 of the same Act, applications may be made for abatement on account of diminution of income, or ceasing to exercise the trade before the end of the year,

(1) 4 B. & Ald. 519, 521.

or from any other specific cause being deprived of the profits or gains on which the assessment was made. On these applications, the validity of the assessment is not disputed, but admitted, the claim for relief being based upon something which has happened since the assessment was made, and which could not have been made the subject of an appeal against the assessment.

There are other provisions in other Acts under which similar relief may be granted. The Customs and Inland Revenue Act, 1890, s. 23, allows relief to be granted to trading or professional persons and farmers in case of losses. The Finance Act, 1896, s. 27, allows relief where the profits and gains arising from the occupation of lands fall short of one-third of the annual value thereof. The Finance Act, 1907, s. 24, replaces s. 133 of the Income Tax Act, 1842. There is not any appeal on applications for relief under the sections of the three last-mentioned Acts to which I have referred: *Grimes* v. *Lethem* (1); *Bruce* v. *Burton*. (2)

The argument for the Crown in support of the claim to an appeal on applications made under s. 134 is based upon the following words in s. 118: "and no appeal shall be received after the time so limited, except on the ground of diminution of income as herein mentioned." These words occur in a section giving a right of appeal against assessments, and limiting the time within which such appeals may be brought. The words "and no appeal shall be received after the time so limited" make it clear that "appeals" can only be brought within the time limited and not afterwards.

It then appears to have occurred to the framers of the statute that, as applications for relief under the subsequent sections could not from their nature be made within the time limited for appeals, it might be well to enact expressly that the provision shutting out appeals made after the time had expired should not extend to applications for relief, and hence the insertion of the words "except on the ground of diminution of income, as herein mentioned."

We are quite unable to hold that the provision excepting these applications from the time within which appeals can be

(1) 3 Tax Cases, 622. (2) 4 Tax Cases, 399.

C. A. 1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

brought is sufficient to make them appeals, which they are not in fact, and to give a right of appeal to the High Court which would not otherwise exist.

Sect. 134 gives the right "to make application," not to appeal. There is not anything from which the applicant is appealing. The reference in the same section to causing "the assessment to be amended" is purely consequential. Similar words were contained in s. 133, but have dropped out of s. 24 of the Finance Act, 1907, which has now replaced s. 133.

It was urged by the Solicitor-General that s. 164 made applications for exemption "appeals," which they would not otherwise be; and if so, why might not s. 118 have the same effect with regard to applications on the ground of diminution of income? The answer is that applications for exemption under s. 164 are in substance and in fact appeals against any assessment being made. The person claiming exemption disputes that he ought to be assessed to income tax at all; and if he succeeds, the Commissioners are required to "discharge the assessment," and if the surveyor objects, the taxpayer is given an appeal to the Commissioners against the assessment, in like manner as other aggrieved persons are given a right to appeal against their assessments.

In all these cases, the complaint is against the assessment, and is strictly an appeal against the assessment.

We are of opinion that an application for relief under s. 134 is not "an appeal" under the Income Tax Acts, and is not within s. 59 of the Taxes Management Act, 1880, and the Commissioners have no power to state a case, and consequently that the decision of Scrutton J. was correct.

Our attention has been called to the case of *Russell* v. *North of Scotland Bank* (1), which is a decision of the Court of Session on s. 133 of the Income Tax Act, 1842. The question of the right to appeal was raised in that case, but there is no decision of the Court upon it, although the Court appears to have assumed jurisdiction and proceeded to deal with the case on the merits and reversed the determination of the Commissioners. In the

(1) 3 Tax Cases, 14; 28 Sc. L. R. 389; 18 R. 543.

absence of any reasons for deciding that the Court had jurisdiction, we are unable to examine that case further, but we are not bound by it, and do not see our way to follow it.

This appeal must be dismissed with costs.

C. A. 1913

FURTADO v. CITY OF LONDON BREWERY COMPANY.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Godden, Holme & Ward.*

R. M.

[IN THE COURT OF APPEAL.]

C. A. 1914 *Jan.* 12, 13.

OKURA & CO., LIMITED *v.* FORSBACKA JERNVERKS AKTIEBOLAG.

[1913 O. 1218.]

Practice—Foreign Corporation—Service of Writ within Jurisdiction—Carrying on Business—Agent in England—No Authority to contract.

The defendants were a foreign corporation carrying on business in Sweden as manufacturers. They employed as their sole agents in the United Kingdom a firm in London who also acted as agents for other firms and carried on business as merchants on their own account. The agents had no general authority to enter into contracts on behalf of the defendants, but they obtained orders and submitted them to the defendants for their approval. On being notified by the defendants that they accepted the orders the agents signed contracts with the purchasers as agents for the defendants. The goods were shipped direct from the defendants in Sweden to the purchasers. The agents in some cases received payment in London from the purchasers and remitted the amount to the defendants less their agreed commission:—

Held, that the defendants were not carrying on their business at the agents' office in London so as to be resident at a place within the jurisdiction, and that service of a writ on the agents at their office was, therefore, not a good service on the defendants.

Grant v. *Anderson* [1892] 1 Q. B. 108, followed.

Saccharin Corporation v. *Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 K. B. 516, distinguished.

APPEAL from Ridley J. at chambers.

The plaintiffs issued a writ against the defendants claiming damages for breach of a contract for the supply by the defendants to the plaintiffs of a certain quantity of steel billets. The

C. A. 1914

OKURA & Co., LIMITED v. FORSBACKA JERNVERKS AKTIEBOLAG.

defendants were a Swedish company carrying on business in Sweden as manufacturers of steel. The writ was served in London on Carl Svedburg, a member of a firm of C. & J. Svedburg, who carried on business as general agents and general merchants at 101, Leadenhall Street, London, and in Stockholm. Svedburgs had since 1899 acted as sole agents in England for the defendants; they also acted as agents for other Swedish firms engaged in the steel trade; and they also bought and sold steel and other merchandise on their own account as principals.

With regard to the defendants' business it appeared from an affidavit of Carl Svedburg that the arrangement between the defendants and his firm had been made by their Stockholm house and was terminable by six months' notice on either side. Svedburgs were not bound to place orders coming to them with the defendants, and any orders submitted to Svedburgs in London by intending purchasers were sent to their firm in Stockholm, who in the case of orders which they considered suitable for the defendants obtained from the defendants the price and terms upon which they were prepared to sell, and then sent the information to their London office. Svedburgs in London then submitted the price and terms to the intending buyers, and if a sale resulted Svedburgs signed the contract in London as agents for the defendants. They had never sold any steel manufactured by the defendants except as agents and in the above manner. They had no control over the way in which the defendants did their business and had no general authority from them with regard to making contracts. Svedburgs' remuneration was by commission only. Deliveries under contracts were made by the defendants shipping the goods at Swedish ports, but payment was sometimes, as in the present case, agreed to be made in London, in which case Svedburgs received it as agents for the defendants and paid it over to them less the amount of the commission. Svedburgs were the lessees of their offices at 101, Leadenhall Street, and paid the rent themselves. The defendants had no right of access to or user of Svedburgs' offices and never had used them; and the defendants' name did not appear on Svedburgs' letter paper or other printed documents.

In an affidavit of the managing director of the defendants it

was stated that Svedburgs had no general authority from the defendants to accept offers, and every offer was submitted to the defendants, and could only be accepted by Svedburgs as agents for the defendants when they had received the defendants' express authority in each particular case.

According to an affidavit filed on behalf of the plaintiffs the contract for breach of which the action was brought was entered into by Svedburgs as agents for the defendants and was signed in London, and all the correspondence relative to the contract was carried on between the plaintiffs and Svedburgs as agents for the defendants. The invoices for the goods were made out and delivered by Svedburgs to the plaintiffs, and Svedburgs received, delivered, and alone handled in this country the shipping documents relating to goods of the defendants' manufacture received in England.

The defendants entered a conditional appearance to the writ, and then applied to set aside the writ and the service of the writ on the ground that they did not carry on business in England so as to be resident at a place within the jurisdiction. The Master made an order setting aside the writ and the service thereof, and an appeal of the plaintiffs to Ridley J. from the Master's order was dismissed.

The plaintiffs appealed.

Shearman, K.C., and *McCardie*, for the plaintiffs. The present case is really indistinguishable from *Dunlop Pneumatic Tyre Co.* v. *Actiengesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (1) and *Saccharin Corporation* v. *Chemische Fabrik von Heyden Aktiengesellschaft.* (2) The proper inference to be drawn from the facts is that the defendants are carrying on their business in London; if so they are resident within the jurisdiction and may be served here. The *Saccharin Corporation Case* (2) shews that it is not necessary that the rent of the office in London should be paid by the foreign corporation, and that it does not make any difference that the agent is paid by commission and does not act solely as agent for the foreign corporation. It is also immaterial that in this case the agents in

(1) [1902] 1 K. B. 342. (2) [1911] 2 K. B. 516.

C. A. 1914

OKURA & Co., LIMITED v. FORSBACKA JERNVERKS AKTIEBOLAG.

London have no general authority to conclude contracts for the defendants. The question is, do the total operations performed by the agents constitute a carrying on of business by the defendants in London? On the evidence the answer to that question ought to be in the affirmative, in spite of the fact that some parts of the business are performed in Sweden. *Grant* v. *Anderson* (1) was a very different case from the present, for there the agent in London merely kept samples of the defendants' goods in his office in London and transmitted orders to them in Scotland for their approval. [They also cited *La Bourgogne* (2) and *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Ry. Co.* (3)]

Leck, K.C., and *Chaytor*, for the defendants, were not called upon.

BUCKLEY L.J. The question in this case is whether the defendants, who are a foreign corporation, can be served with a writ in this country. The answer to that question depends on whether the defendants can be found "here" for the purpose of being served. In one sense, of course, the corporation cannot be "here." The question really is whether this corporation can be said to be "here" by a person who represents it in a sense relevant to the question which we have to decide. The point to be considered is, do the facts shew that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as shewing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be "here" by a person who carries on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must

(1) [1892] 1 Q. B. 108. (2) [1899] A. C. 431.
(3) [1912] 1 K. B. 222.

be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression "doing business"? Several authorities have been cited in the course of the argument, but it is only necessary, I think, to refer to three of them. In the *Dunlop Case* (1), the question turned on the first of the three matters which I have mentioned, the question of time. The duties of the agent were to attend at a stand taken at the Crystal Palace for the exhibition of the defendants' goods and to take orders for and to press the sale of their goods. There is no doubt that the defendants in that case were doing business in this country by an agent; the only difficulty was that the exhibition lasted but a very short time, nine days. The Court held that the time was sufficient: that during the continuance of the exhibition the defendants were carrying on business here. In the *Saccharin Corporation Case* (2) the question was whether the foreign corporation was "here" by an agent who had authority to do the corporation's business. It is stated in the facts that the agent obtained orders in England for the defendants' goods, and that in some instances he entered into contracts in the defendants' name at his office in London for the sale of their goods without submitting the orders to the defendants for their approval. Fletcher Moulton L.J. in the course of his judgment said (3): "He" (the agent) "carries on business at a fixed place in London as sole agent for the defendants in the United Kingdom, though it is true that he is also agent for another firm. He has power to enter into contracts of sale for the defendants; he has their goods at his premises or at public wharves under his control, and he can and does fulfil contracts made by him for the defendants by delivery of these goods." On these facts the Court held that the defendants were carrying on business here by their agent. Two other points were raised in that case, one, that the place of business in this country must necessarily be rented by or leased to the foreign corporation, and the other that the payment of the agent by commission shews that he is not carrying on the

(1) [1902] 1 K. B. 342. (2) [1911] 2 K. B. 516.
(3) [1911] 2 K. B. at p. 524.

C. A. 1914

OKURA & Co., LIMITED v. FORSBACKA JERNVERKS AKTIEBOLAG.

Buckley L.J.

corporation's business but his own. Both these contentions were negatived by the judgments delivered.

The only other case to which I wish to refer is *Grant* v. *Anderson*. (1) That was not a case of a foreign corporation, but of a firm, and the question, therefore, arose under Order XLVIII.A, r. 1, in which the words "carrying on business" occur, whereas in the case of a foreign corporation there is no rule containing those words. This is, however, a distinction without a difference, because the question whether a foreign corporation can be served in this country depends on whether it is resident within the jurisdiction, and that again depends on whether the corporation carries on business here. The facts in *Grant* v. *Anderson* (1) were that the defendants were domiciled and resident in Scotland and carried on business there. They employed an agent in London to obtain orders for them, his remuneration consisting of a commission on business done by him. The agent occupied an office in London, the rent of which he paid, and his duty was to receive and transmit orders to the defendants at Glasgow. He had no authority to conclude contracts for the defendants, except upon express instructions. It was held that the defendants did not carry on their business in London. That case seems to me to be very close to the present case.

The facts are that the defendants have for many years employed as their agents in this country a firm C. & J. Svedburg, who have offices at 101, Leadenhall Street. The extent of the authority of these agents appears from an affidavit of one of the members of the firm. He states that his firm act as agents for six Swedish firms including the defendants. His firm are not bound in any way to place orders coming to them with the defendants, and in placing orders they act only as a branch of their Swedish house, who made in Sweden directly with the defendants the arrangements under which they act and which are terminable at six months' notice by either party. Whenever they sell the defendants' steel they do so expressly as agents and after submitting the inquiry to their Stockholm house, who in turn obtain from the defendants the price and terms upon which they are prepared to sell. When the agents in London have obtained the price

1) [1892] 1 Q. B. 108.

and terms they submit them to the buyers, and if the buyers accept them, they then sign the contract as agents for the defendants. The agents have never sold any steel manufactured by the defendants except as agents and in the manner indicated. They have no control over the way in which the defendants do their business and have no general authority from them with regard to making contracts. In an affidavit of the defendants' managing director he states that Svedburgs have no general authority from the defendants to accept offers and every offer is submitted fully to the defendants and can only be accepted by Svedburgs as the defendants' agents when they receive the defendants' express authority in each particular case.

These being the facts, 101, Leadenhall Street is really only an address from which business is from time to time offered to the foreign corporation; the question whether any particular business shall or shall not be done is determined by the foreign corporation in Sweden and not by any one in London. In my opinion the defendants are not "here" by an alter ego who does business for them here, or who is competent to bind them in any way. They are not doing business here by a person but through a person. That person has to communicate with them, and the ultimate determination, resulting in a contract, is made not by the agents in London, but by the defendants in Sweden. It follows from this that one of the essential elements which must be present before a writ can be served in this country on the agent of a foreign corporation is lacking in this case. This appeal must, therefore, be dismissed.

PHILLIMORE L.J. I am of the same opinion. When a human being is about to be sued, it is necessary that there should be a personal service of the writ upon him. In the case of a corporation that cannot be done, and Order IX., r. 8, provides that service shall be sufficient if it is made upon the head officer or secretary of the corporation. The defendants in this case are a corporation incorporated under the laws of Sweden. It may be that there is some person in this country connected with the defendants in such a way that the writ might properly be served upon him as an officer of the corporation. But that of itself is not sufficient.

C. A. 1914

OKURA & CO., LIMITED v. FORSBACKA JERNVERKS AKTIEBOLAG.

Phillimore L.J.

In order that an officer of a foreign corporation may be served in this country it is necessary that the foreign corporation must be one which can in some sense be said to be locally in this country. I take it that every corporation is prima facie locally situated in the territory of the sovereign power from which it derives its origin; apart from that a corporation has physically no place or attributes of locality, though it may for the purpose of its business occupy a place outside the country of its origin. The question, therefore, is whether the foreign corporation can be said to be "here," to use the expressive phrase employed by Mr. Joseph Walton in arguing *La Bourgogne* (1), and adopted by the Lord Chancellor when giving his opinion in that case. If a foreign corporation can be said to be "here," its officer can be served with a writ. But a foreign corporation may be both "here" and "there," and in this connection Lord St. Leonards in *Carron Iron Co.* v. *Maclaren* (2) spoke of the possibility of a corporation having two domicils, and in other cases judges have spoken of corporations having two residences; both of which expressions have been criticized. The criticisms appear to me to be somewhat captious, for though the expressions "domicil" and "residence" when used with reference to a corporation may not be quite accurate, they are useful metaphors as indicating what is intended, and there is no doubt that a corporation can in a sense be said to be in two places at once though an individual cannot. But a foreign corporation cannot be said to be "here" unless there are facts from which it can be inferred that, like an individual, it is residing here, and in the case of a trading corporation residence means the carrying on of its business. In determining this question the Court ought in my opinion, as Lord Coleridge C.J. said in *Grant* v. *Anderson* (3), to have regard to the broad principles of international comity which in questions of jurisdiction must always be assumed to underlie the rules of Court or the enactments of Parliament. In *Newby* v. *Van Oppen* (4) the facts are only stated shortly, but the Court having come to the conclusion that it was clear that the foreign company

(1) [1899] A. C. 431.
(2) (1855) 5 H. L. C. 416, at p. 459.
(3) [1892] 1 Q. B. at p. 112.
(4) (1872) L. R. 7 Q. B. 293.

was carrying on trade in London and that it could therefore be treated as being resident here, Blackburn J. said (1): "We think that, when once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad." In the case of *La Bourgogne* (2) the facts shewed that a French company which had its head office in Paris was carrying on a branch of its business in this country, and the House of Lords, affirming the decision of the Court of Appeal, held that the company was "here," and none the less so although it was also "there," that is, in France. In the most recent case on this subject, *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Ry. Co.* (3), it was held that the defendant company was carrying on its business in this country although the only part of its business that was done here was the raising of capital for the purpose of the company's business in Canada. All these cases which I have referred to are instances of cases in which the Court has held that there were sufficient materials to shew that the foreign corporation was "here." On the other hand, in *Grant* v. *Anderson* (4), which turned on the words "carrying on business" in Order XLVIII.A, r. 1, it was held that the fact that the defendants had an agent in London whose duty it was to receive and transmit orders to the defendants in Glasgow, but who had no general authority to conclude contracts for the defendants, was not sufficient to shew that the defendants were themselves carrying on business in London. I now come to two cases which have been strongly relied on by counsel for the plaintiffs, the *Dunlop Case* (5) and the *Saccharin Corporation Case.* (6) The *Dunlop Case* (5) does not appear to me to present any difficulty. There the foreign company had taken a stand at an exhibition at the Crystal Palace which only lasted nine days; but during the time the show lasted, although it was only a short time, the company was undoubtedly carrying on its business at that stand. The defendants also

(1) L. R. 7 Q. B. at p. 296.
(2) [1899] A. C. 431.
(3) [1912] 1 K. B. 222.
(4) [1892] 1 Q. B. 108.
(5) [1902] 1 K. B. 342.
(6) [1911] 2 K. B. 516.

C. A. 1914

OKURA & Co., LIMITED v. FORSBACKA JERNVERKS AKTIEBOLAG.

Phillimore L.J.

desired to raise the point that the person in their employ who had been served with the writ was not the defendants' head officer, but this contention had not been raised by the summons, and the Court refused to allow the summons to be amended. The *Saccharin Corporation Case* (1) is no doubt a strong case and possibly the decision goes a little further than some of the previous cases, but it does not in my opinion go as far as we are asked to do in this case. The important distinction between the two cases is that in the *Saccharin Corporation Case* (1) the agent in London had authority to enter into contracts on behalf of the defendants without submitting the orders to them for their approval; whereas in the present case the agents have not that authority, their duty being merely to submit the orders to the defendants; and until they have signified their approval no contract can be entered into. In these circumstances it seems to me impossible to say that the position of the defendants is in any way analogous to that of a person residing or a firm carrying on business in this country.

Appeal dismissed.

Solicitors for plaintiffs: *Munns & Longden.*
Solicitors for defendants: *Ingle, Holmes, Sons & Pott.*

(1) [1911] 2 K. B. 516.

F. O. R.

END OF VOL. I.

BIBL. LONDIN. UNIV.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1914, will be as follows:—

In the First Series,
[1914] 1 Ch. [1914] 2 Ch.

In the Second Series,
[1914] 1 K. B. [1914] 2 K. B. [1914] 3 K. B. [1914] P.

In the Third Series,
[1914] A. C.

INDEX.

ACTION—Joinder of causes of action—Claim by executor—Personal claim - - **283**
See PRACTICE. 2.

ACTS OF PARLIAMENT.
See under STATUTE and under STATUTES.

ADMIRALTY.
See under SHIPPING.

ADMISSIBILITY—Evidence.
See under EVIDENCE.

ADULTERATION — *False Warranty — Place where Offence committed—Omission to serve Copy of Analyst's Certificate with Summons—Jurisdiction—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2; *s.* 20, *sub-s.* 6.

Where an article of food is sent to a purchaser with a written warranty proceedings for the falsity of the warranty may be taken under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, before justices having jurisdiction in the place where the warranty was received by the purchaser, although it may have been written and attached to the goods in a place outside their jurisdiction.

Non-compliance with the provisions of s. 19, sub-s. 2, of the said Act, which enacts that "In any prosecution under the Sale of Food and Drugs Acts . . . . there must be served therewith"—along with the summons—"a copy of any analyst's certificate obtained on behalf of the prosecutor," does not deprive the justices of jurisdiction to hear the information, but is an informality in procedure only which may be waived by the party charged. GRIMBLE & Co. *v.* PRESTON - - - - - **Div. Ct. 270**

ADVERTISEMENT—Copyright—Literary work—Author—Translation from foreign language - - - - - **622**
See COPYRIGHT. 1.

AFFIDAVIT—Certiorari—Rule nisi—Sufficiency of affidavit—Conviction—Disqualification of magistrate—Knowledge of facts disqualifying—Bread Act, 1836 - **608**
See CROWN OFFICE.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGGREGATION—Estate duty - - - **351**
See REVENUE. 1.

AGREEMENT—Contract.
See under CONTRACT.

AGRICULTURAL LAND.
See under LAND.

AIR CRAFT—Shops—Weekly half-holiday—Exemptions—"Sale of motor cycle and aircraft supplies and accessories to travellers" - - - - - - **35**
See SHOPS. 1.

ALEHOUSE ACT, 1828, s. 14 - - - **468**
See LICENSING ACTS. 2.

APPEAL—Local Government Board—Powers and duties—Closing order—Appeal—Public local inquiry—Power of inspector—Confidential document—Right of appellant to be heard - - - **160**
See LOCAL GOVERNMENT BOARD.

—— Revenue—Income tax — Application to Commissioners for relief—Power to state a case - - - - - **709**
See REVENUE. 2.

—— Revenue—Increment value duty—Appeal from referee—Oral evidence on appeal
See REVENUE. 6. **339**

—— Revenue—Undeveloped land duty—Person chargeable—Owner for the time being—Right of appeal - - - **327**
See REVENUE. 12.

—— Seaman—Wages—Special case—Summary jurisdiction - - - - - **616**
See SHIPPING. 6.

ARREST — False imprisonment — Defence to action for—Arrest without warrant—Felony - - - - - **595**
See FALSE IMPRISONMENT.

ASSESSMENT—Taxes
See under REVENUE.

ATTENDANCE — School — Cookery centre — Compulsory attendance - - **207**
See SCHOOLS.

AUTHOR—Copyright—Literary work—Advertisement — Translation from foreign language - - - - - - **622**
See COPYRIGHT. 1.

BANK—Gaming—Cheques given for racing bets —Whether bank an "indorsee" - **118**
See GAMING.

BASTARDY — *Evidence — Corroboration — Conviction for having had Unlawful Carnal Knowledge—Proof of Conviction—Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

Upon the hearing of a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, the only evidence adduced in corroboration of that of the complainant was the evidence of a person who deposed that he had been present at the trial and conviction of the alleged father of the complainant's child at the assizes upon an indictment charging him with having had unlawful carnal knowledge of the complainant:—

Held, that evidence of the conviction was admissible; that the conviction was sufficiently proved; and that this evidence was corroboration of the complainant's evidence in a material particular as required by the statute. MASH *v.* DARLEY - - - - - - **Div. Ct. 1**

BETTING.
See under GAMING.

BICYCLE—Lamp—Motor cycle—Motor car - **51**
See MOTOR CAR. 2.

—— Shop — Weekly half-holiday — Exemptions - - - - - - - **35**
See SHOPS. 1.

BILL OF LADING—Shipping.
See under SHIPPING.

BILL OF SALE—*Grant of, in Consideration of a Sum under Thirty Pounds—Deduction for Expenses—Bills of Sale Act*, 1882 (45 *&* 46 *Vict. c.* 43), *s.* 12.

A bill of sale was given in consideration of a sum of 27*l.* 18*s.* paid to the grantor and of a sum of 2*l.* 2*s.* paid by the grantee to his solicitor with the grantor's consent towards the legal expenses of the transaction:—

Held, that the bill was not void under s. 12 of the Bills of Sale Act, 1882, as being given in consideration of a sum under 30*l.* LONDON AND PROVINCES DISCOUNT COMPANY *v.* JONES. STANDARD DEVELOPMENTS, LIMITED (CLAIMANTS) - - - - **Div. Ct. 147**

BREAD—Bread Act, 1836—Disqualification of magistrate — Knowledge of facts disqualifying - - - - - **608**
See CROWN OFFICE.

BREWERY—Income tax — Deductions —Tied houses—Repairs—Insurance premiums —Loss on rents—Legal expenses - **357**
See REVENUE. 3.

BROKER—Sale of goods—Broker receiving del credere commission—Non-performance of contract—Solvent buyer—Liability of broker - - - - - - **449**
See PRINCIPAL AND AGENT.

BUILDING—Hoardings for protection of passengers in street — Necessity for licence of borough council—Building operations — Exemption of school buildings - - - - - - **505**
See LONDON. 1.

—— Reversion duty—Expenditure on building by lessee - - - - - - **641**
See REVENUE. 9.

BUILDING CONTRACT—*Obligation of Building Owner to give Possession—Possession given—Subsequent Interference by Wrong-doer—Delay and Damage to Builder—Liability of Building Owner.*

By a contract in writing it was agreed that the plaintiff should build a school for the defendants, upon a site belonging to them, within ten months after the date of the contract, and that he should commence work and be at liberty to enter upon the site forthwith. The only access to the site was from a road adjoining other land of the defendants and over that land, and it was provided that the plaintiff should make a temporary roadway over that land from the street to the site. Possession of the site was given forthwith, and the defendants made a gateway through the fence separating their land from the street, and the plaintiff made and used the temporary roadway from the site through the gateway to the street. The owner of the soil of the street, alleging that it was not a public highway, prohibited its use by the plaintiff and threatened to sue him for an injunction. The plaintiff in consequence ceased work, for more than two months, until after the defendants had sued the owner of the soil of the street and obtained a decision that it was a public highway.

The plaintiff claimed damages for loss caused by the delay of the work, alleging a breach of the defendants' implied contract to give free and uninterrupted possession of and access to the site:—

Held, that there was no obligation, express or implied, upon the defendants to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site. PORTER *v.* TOTTENHAM URBAN DISTRICT COUNCIL - **Div. Ct. 663**

CARRIAGE OF GOODS—Railway.
See under RAILWAY.

CASES:—

—— *Brickwood & Co.* v. *Reynolds* [1898] 1 Q. B. 95.
Applicable. USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE
[1914] 1 K. B. 357

CASES—*continued.*

—— *Brierly* v. *Kendall* - (1852) 17 Q. B. 937
Applied. BELSIZE MOTOR SUPPLY COMPANY *v.* COX - [1914] 1 K. B. 244

—— *Brooks* v. *Inland Revenue Commissioners* [1913] 3 K. B. 398.
Affirmed - - [1914] 1 K. B. 579

—— *Chinery* v. *Viall* - (1860) 5 H. & N. 288
Applied. BELSIZE MOTOR SUPPLY COMPANY *v.* COX - [1914] 1 K. B. 244

—— *Davies* v. *Glamorgan Coal Co. Ld.* [1913] 3 K. B. 222.
Varied - - - [1914] 1 K. B. 674

—— *Freer* v. *Murray* - [1894] A. C. 576
Discussed. WERNHAM *v.* REX [1914] 1 K. B. 468

—— *Furtado* v. *City of London Brewery Co.* [1914] 1 K. B. 152.
Affirmed - - [1914] 1 K. B. 709

—— "*Glendevon*," *The* - - [1893] P. 269
Distinguished. MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER [1914] 1 K. B. 304

—— *Grant* v. *Anderson* - [1892] 1 Q. B. 108
Followed. OKURA & CO., LIMITED *v.* FORSBACKA JERNVERKS AKTIEBOLAG - - - [1914] 1 K. B. 715

—— *Helby* v. *Matthews* - [1895] A. C. 471
Followed. BELSIZE MOTOR SUPPLY COMPANY *v.* COX - [1914] 1 K. B. 244

—— *Hutchins* v. *Chambers* (1758) 1 Burr. 579
Followed. MACGREGOR *v.* CLAMP & SON - - - [1914] 1 K. B. 288

—— *Ingram & Royle*, v. *Services Maritimes du Tréport* [1913] 1 K. B. 538.
Reversed - - [1914] 1 K. B. 541

—— *Johnson* v. *Stear* (1863) 15 C. B. (N.S.) 330
Applied. BELSIZE MOTOR SUPPLY COMPANY *v.* COX - [1914] 1 K. B. 244

—— *Jones* v. *Jones* - - [1910] 2 K. B. 262
Followed. ATKINS *v.* AGAR [1914] 1 K. B. 26

—— *Juson* v. *Dixon* - - (1813) 1 M. & S. 601
Followed. MACGREGOR *v.* CLAMP & SON - - - [1914] 1 K. B. 288

—— *Laing* v. *Hollway* - (1878) 3 Q. B. D. 437
Followed. MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER [1914] 1 K. B. 304

—— *Lee* v. *Butler* - - [1893] 2 Q. B. 318
Distinguished. BELSIZE MOTOR SUPPLY COMPANY *v.* COX [1914] 1 K. B. 244

—— *Lysaght* v. *Edwards* (1876) 2 Ch. D. 499
Followed and applied. ALLEN *v.* INLAND REVENUE COMMISSIONERS [1914] 1 K. B. 327

—— *Metropolitan Water Board* v. *Avery* [1913] 2 K. B. 257.
Affirmed - - [1914] 1 K. B. 221

CASES—*continued.*

—— *Mortimer* v. *M'Callan* (1840) 6 M. & W. 58
Followed and applied. OWNER *v.* BEE HIVE SPINNING COMPANY, LIMITED [1914] 1 K. B. 105

—— *Nelson & Sons* v. *Nelson Line, Liverpool* [1907] 2 K. B. 705.
Distinguished. MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER [1914] 1 K. B. 304

—— *Pine* v. *Barnes* - (1887) 20 Q. B. D. 221
Distinguished. ATKINS *v.* AGAR [1914] 1 K. B. 26

—— *Postmaster-General* v. *Hendon Urban District Council* [1913] 3 K. B. 451.
Affirmed - - [1914] 1 K. B. 564

—— *Reg.* v. *Beighton* (1897) 18 Cox, C. C. 535
Overruled. REX *v.* SHELLAKER [1914] 1 K. B. 414

—— *Rex* v. *Local Government Board, Ex parte Arlidge* [1913] 1 K. B. 463.
Reversed - - [1914] 1 K. B. 160

—— *Royal Mail Steam Packet Co. and River Plate Steamship Co., In re* [1910] 1 K. B. 600.
Followed. MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER [1914] 1 K. B. 304

—— *Saccharin Corporation* v. *Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 K. B. 516.
Distinguished. OKURA & CO., LIMITED *v.* FORSBACKA JERNVERKS AKTIEBOLAG - - - [1914] 1 K. B. 715

—— *Stepney and Bow Educational Foundation* (*Governors*) v. *Inland Revenue Commissioners* [1913] 3 K. B. 570.
Decision of Horridge J. on one point overruled. MARQUIS CAMDEN *v.* INLAND REVENUE COMMISSIONERS [1914] 1 K. B. 641

—— *Tower Justices* v. *Chambers* [1904] 2 K. B. 903.
Discussed. WERNHAM *v.* REX [1914] 1 K. B. 468

—— *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229.
Distinguished. INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED [1914] 1 K. B. 541

—— *West Ham Churchwardens* v. *Fourth City Mutual Building Society* [1892] 1 Q. B. 654.
Distinguished. REX *v.* ROBERTS [1914] 1 K. B. 369

—— *Westminster Corporation* v. *Gordon Hotels* [1908] A. C. 142.
Followed and applied. WILLS & SONS *v.* MCSHERRY - [1914] 1 K. B. 616

—— *White & Hales* v. *Islington Corporation* [1909] 1 K. B. 133.
Considered. REX *v.* ROBERTS [1914] 1 K. B. 369

CASES—*continued.*

—— *Wylie Hill* v. *Inland Revenue Commissioners*, 1912 S. C. 1246.
Approved. BROOKS *v.* INLAND REVENUE COMMISSIONERS
[1914] 1 K. B. 579

CERTIORARI—*Acquittal—Maxim, "Nemo debet bis vexari pro una et eadem causa"—Justice of the Peace—Statutory Disqualification—Coal Mines Act*, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 74; *s.* 103, *sub-s.* 2.

Sect. 103, sub-s. 2, of the Coal Mines Act, 1911, provides that where proceedings are taken in a Court of summary jurisdiction in respect of an offence against the Act alleged to have been committed in a mine "a person employed in a mine . . . . shall not, except with the consent of both parties to the case, act as a member of the Court."

Two miners were charged before justices sitting as a Court of summary jurisdiction with an offence under s. 74 of the Coal Mines Act, 1911, alleged to have been committed in a mine. The information was dismissed. One of the magistrates who formed the Court was a person employed in a mine within the meaning of s. 103, sub-s. 2, of the Act, but this fact was not known to the prosecutor at the time of the hearing, and he did not consent to this magistrate acting as a member of the Court.

On an application for a certiorari to quash the order dismissing the information:—

Held, that as the defendants had been acquitted of the offence charged against them, a certiorari to quash the proceedings ought not to be granted. THE KING *v.* SIMPSON **Div. Ct. 66**

—— Rule nisi—Sufficiency of affidavit—Conviction—Disqualification of magistrate—Knowledge of facts disqualifying—Bread Act, 1836 - - - - **608**
See CROWN OFFICE.

CHARTERPARTY—Shipping.
See under SHIPPING.

CHEQUE.
See under BANK.

CHILDREN.
See under INFANT.

CHILDREN ACT, 1908, s. 12 - - - **216**
See INFANT.

—— **s. 17** - - - - - - - - **137**
See CRIMINAL LAW. 1.

CHILDREN ACT (1908) AMENDMENT ACT, 1910, s. 1 - - - - - **137**
See CRIMINAL LAW. 1.

CINEMATOGRAPH—Justices—Power to state case—Application for cinematograph licence—Justices "sitting in petty sessions" - - - - - - **109**
See JUSTICES. 2.

COAL MINE.
See under MINE.

COAL MINES ACT, 1911, ss. 74, 103 - - **66**
See CERTIORARI.

COAL MINES (MINIMUM WAGE) ACT, 1912
See MINE. **674**

COMMISSION—Sale of goods—Broker receiving del credere commission—Non-performance of contract—Solvent buyer—Liability of broker - - - - **449**
See PRINCIPAL AND AGENT.

COMMON LODGING-HOUSES.
See under LODGING-HOUSES.

COMPANY—Income tax—Additional assessment—Notice—Managing director—Company's office - - - - **632**
See REVENUE. 4.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

COMPULSORY PILOTAGE.
See under PILOTAGE.

CONDITIONAL POWER—Power to determine tenancy for certain purposes—Undeveloped land duty—Agricultural land
See REVENUE. 11. **515**

CONFIDENTIAL DOCUMENT—Report of inspector—Right of appellant to be heard - - - - - - **160**
See LOCAL GOVERNMENT BOARD.

CONSIDERATION—Bill of sale—Grant of, in consideration of a sum under thirty pounds—Deduction for expenses - **147**
See BILL OF SALE.

CONTRACT—Building contract.
See under BUILDING CONTRACT.

—— Foreign corporation—Service of writ within jurisdiction—Carrying on business—Agent in England—No authority to contract - - - - **715**
See PRACTICE. 1.

—— Railway—Carriage of goods - - **263**
See RAILWAY.

—— Sale of goods.
See under SALE OF GOODS.

CONVERSION—Hire and purchase—Contract or option to buy—Pledge—Measure of damages—"Person having agreed to buy" - - - - - - **244**
See SALE OF GOODS.

COPYRIGHT—*Literary Work—Author—Advertisement—Translation from Foreign Language—Translation made for Reward—Right of Translator to Copyright—Innocent Infringer—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 5, 8.

The plaintiff, who was permanently employed on the editorial staff of a newspaper, was specially employed and paid by the proprietors of the paper to translate and summarize a speech, reported in a foreign language, for the purpose of publication as an advertisement in their paper for a foreign State, and this work was done

COPYRIGHT—*continued.*

entirely in his own time and independently of his ordinary duties. The summarized translation was published in the paper as an advertisement with the words "Translated from the Portuguese language by F. D. Byrne" printed at the end.

The defendants saw this advertisement, obtained permission from the Governor of the foreign State to publish it as an advertisement in their paper, and reproduced it verbatim. It was proved that it was the practice of newspaper managers, when they wished to publish an advertisement appearing in another paper, to ask the permission of the advertiser to do so and to act upon his instructions; but that the addition to an advertisement of such words as "translated by . . . ." was quite unprecedented:—

Held, that the translation was an "original literary work," within s. 1 of the Copyright Act, 1911, of which the plaintiff was the author; that the plaintiff was the owner of the copyright therein, within s. 5; that the defendants were not innocent infringers, within s. 8, who were not aware of, and had no reasonable ground for suspecting, the existence of copyright in the work; and that the plaintiff was entitled to damages. BYRNE *v.* STATIST COMPANY

Bailhache J. 622

2. —— *Musical Work—Gramophone Records—Records made before Commencement of Act—Sale after Commencement — Infringement — Royalties—Board of Trade Regulations for "securing the payment of royalties"—Affixing adhesive Label to Record—Validity—Copyright Act*, 1911 (1 *& 2 Geo.* 5, *c.* 46), *ss.* 1, 2, 19, 24.

Sect. 1, sub-s. 2 (*d*), of the Copyright Act, 1911, for the first time gives the author of a literary, dramatic, or musical work the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.

The plaintiff in the early part of 1911 composed and published an original musical work. Before the commencement of the Copyright Act, 1911 (July 1, 1912), the defendants manufactured abroad and imported into England gramophone records of the plaintiff's musical work, and after the commencement of the Act they sold these records without the plaintiff's consent and without payment of royalties:—

Held, that the defendants had thereby infringed the plaintiff's copyright in his musical work.

By s. 19, sub-s. 6, of the Act, the Board of Trade may make regulations prescribing "the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties."

The Board of Trade made a regulation that, unless otherwise agreed, the royalty should be payable by means of an adhesive label purchased from the owner of the copyright and denoting the amount of the royalty, the label to be affixed to the record before delivery to a purchaser:—

Held, that this regulation was intra vires as being one for "securing," that is to say ensuring, the payment of royalties. MONCKTON *v.* PATHÉ FRÈRES PATHEPHONE, LIMITED - **C. A. 395**

CORPORATION—Foreign—Service of writ within jurisdiction — Carrying on business — Agent in England—No authority to contract - - - - - **715**
See PRACTICE. 1.

COUNTY COURT—*Practice — Postponement of Trial—"Good cause" — Pendency of Action in High Court raising similar Issue—County Court Rules*, 1903 *and* 1904, *Order XII., r.* 16.

Order XII., r. 16, of the County Court Rules provides that ". . . . the Court may, in its discretion . . . . make an order postponing or adjourning for good cause the trial of any action or matter upon such terms, as to costs or otherwise, as may be just."

Held, that the pendency in the High Court of an action involving practically the same issue as that raised in the county court action may be "good cause" within the above rule entitling the county court judge, in the exercise of his discretion, to postpone the trial of the action in his Court till after the hearing of the High Court action. HAMMOND BROTHERS AND CHAMPNESS, LIMITED *v.* JACKSON - - **Div. Ct. 241**

COUNTY COURT RULES, 1903 and 1904, Order XII., r. 16 - - - - **241**
See COUNTY COURT.

CRIMINAL LAW—*Girl under Age of Sixteen Years—Unlawful Carnal Knowledge—Causing or encouraging—Knowingly allowing—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 17—*Children Act* (1908) *Amendment Act*, 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 25), *s.* 1.

By s. 17, sub-s 1, of the Children Act, 1908, as amended by s. 1 of the Children Act (1908) Amendment Act, 1910, if any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the unlawful carnal knowledge of that girl he is guilty of a misdemeanour.

By s. 17, sub-s. 2 of the Act of 1908 as amended by s. 1 of the Act of 1910, a person shall be deemed to have caused or encouraged the unlawful carnal knowledge of a girl who has been unlawfully carnally known if he has knowingly allowed the girl to consort with any prostitute or person of known immoral character.

The appellant was charged under the above enactments with causing or encouraging the unlawful carnal knowledge of his daughter, a girl under the age of sixteen years. He was an engine driver and was obliged to be away from home at night for a fortnight in every four weeks. He was the father of three girls, the youngest being under the age of sixteen years. His wife, the stepmother of the girls, was addicted to drunkenness. When he was on duty by day the girls were at home by half-past 9 at night. When he was on duty at night the girls were allowed to be out later and to consort with persons of known immoral character. The appellant and his wife were repeatedly warned to exercise more control over the girls. The

CRIMINAL LAW—*continued.*
eldest girl was seduced and after being removed to a home where she was delivered of a child she returned with her child to her father's house. On one occasion the appellant, seeing the youngest girl passing the door at half-past 9 o'clock at night talking to a man, had ordered her indoors and reproved her. On other occasions he had remonstrated with her and threatened to send her to a home if she did not behave herself properly. There was no evidence that he knew she was having immoral intercourse with men. The youngest girl having been seduced, the present proceedings were commenced :—

Held, that there was no evidence fit to be left to the jury that the appellant had knowingly allowed the girl to consort with persons of known immoral character within the meaning of s. 17, sub-s. 2, of the Act of 1908. THE KING *v.* CHAINEY - - - - - **C. C. A. 137**

2. —— *Sale of Forged Stamps—Stamps cancelled before Sale—Stamp Duties Management Act*, 1891 (54 *&* 55 *Vict. c.* 38), *s.* 13.

Sect. 13 of the Stamp Duties Management Act, 1891, enacts that a person who "knowingly sells or exposes for sale or utters or uses any forged stamp" shall be guilty of felony :—

Held, that a person who sells a forged stamp commits an offence against s. 13, notwithstanding that the stamp when sold bears a cancellation mark. THE KING *v.* LOWDEN - **C. C. A. 144**

3. —— *Unlawful Carnal Knowledge of Girl under Sixteen—Evidence of previous Offence against the same Girl—Previous Offence more than Six Months before Commencement of Prosecution—Admissibility—Criminal Law Amendment Act*, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 5.

The accused was indicted for unlawfully and carnally knowing a girl under the age of sixteen within six months of the commencement of the prosecution, under s. 5 of the Criminal Law Amendment Act, 1885, which, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904, provides that no prosecution for this offence shall be commenced more than six months after its commission.

At the trial evidence was admitted of previous acts and conduct of the accused which tended to prove that he had had connection with the girl more than six months before the commencement of the prosecution :—

Held, that the evidence was admissible to prove the offence with which the prisoner was charged, although it might prove a previous offence for which he could not be prosecuted.

Reg. v. *Beighton* (1897) 18 Cox, C. C. 535, overruled. THE KING *v.* SHELLAKER **C. C. A. 414**

—— Bastardy.
See under BASTARDY.

—— Justices.
See under JUSTICES.

—— Vexatious actions—Order that no legal proceedings be instituted without leave of High Court—Criminal proceedings **122**
See VEXATIOUS ACTIONS.

CROWN OFFICE—*Certiorari—Rule Nisi—Sufficiency of Affidavit—Conviction—Disqualification of Magistrate—Knowledge of Facts disqualifying—Bread Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 37), *s.* 15.

By s. 15 of the Bread Act, 1836, no person who shall be concerned in the business of a baker shall be capable of acting or shall be allowed to act as a justice of the peace under the Act, and if any baker shall presume so to do he shall for every such offence forfeit a penalty.

A baker was charged under s. 4 of the Act with selling bread otherwise than by weight and was convicted in presence of two justices. He obtained a rule nisi for a writ of certiorari to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the rule nisi was obtained did not state that any objection to the competence of the Court was taken at the hearing before the justices, nor did it state that at the date of that hearing the applicant was without knowledge of the facts alleged to disqualify one of the justices :—

Held, that this defect in the affidavit disentitled the applicant to the issue of a writ of certiorari ex debito justitiæ.

Held, also, on the facts, that, the granting of the writ being discretionary, the discretion should be exercised by refusing the writ. THE KING *v.* WILLIAMS (SWANSEA JUSTICES). *Ex parte* PHILLIPS - - - - - **Div. Ct. 608**

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

CYCLE—Motor cycle.
See under MOTOR CAR.

DAMAGES—Hire and purchase—Contract or option to buy—Pledge—Conversion—Measure of damages—"Person having agreed to buy" - - - - - **244**
See SALE OF GOODS.

DEL CREDERE COMMISSION—Broker receiving—Sale of goods—Non-performance of contract—Solvent buyer—Liability of broker - - - - - - **449**
See PRINCIPAL AND AGENT.

DELAY—Building contract—Delay and damage to builder—Liability of building owner
See BUILDING CONTRACT. **663**

DESERTION—Persuading seaman to desert—Articles not signed—"His ship" - **462**
See SHIPPING. 5.

DESPATCH DAYS—Sunday included in—Shipping—Charterparty—Lay days
See SHIPPING. 2. **304**

DIRECTOR—Company.
See under COMPANY.

DISQUALIFICATION—Justice of the peace—Statutory disqualification—Coal Mines Act, 1911—Certiorari—Acquittal - **66**
See CERTIORARI.

—— Magistrate—Knowledge of facts disqualifying—Bread Act, 1836 - - - **608**
See CROWN OFFICE.

DISTRESS—*Distress for Tax—Tax charged upon Premises — Income Tax under Sched. A. — Inhabited House Duty—Goods of Third Person on the Premises—Implement of Trade—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 86.

Under s. 86 of the Taxes Management Act, 1880, a collector of taxes may distrain for arrears of income tax under Sched. A of the Income Tax Act, 1842, and for inhabited house duty, which are taxes charged on the land, the goods of a third person on the premises charged; and an implement of trade is not exempt from a distress for taxes.

Juson v. *Dixon* (1813) 1 M. & S. 601, and *Hutchins* v. *Chambers* (1758) 1 Burr. 579, followed. MACGREGOR *v.* CLAMP & SON

Div. Ct. 288

DOCKS — *Port Rates — Exemption—Goods imported for Transhipment only—Goods exported "coastwise"—Transhipment in Port of London for Rochester—Conveyance "by sea only"—Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c. c.*), *Schedule*, *s.* 9.

Sect. 13, sub-s. 1, of the Port of London Act, 1908, provides that, subject to the provisions of that section, all goods imported from parts beyond the seas or coastwise into the Port of London or exported beyond the seas or coastwise from that port shall, subject to any exemptions or rebates contained in a provisional order under the section, be liable to port rates, provided that "the provisional order . . . . shall provide for exempting from such rates goods imported for transhipment only . . . ."

Sect. 13, sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point . . . ."

Sect. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, provides that "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only . . . . For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise" which are certified and proved within the period and in the manner provided by the section to have been intended for transhipment and to have been shipped again as soon as practicable within the Port of London for conveyance by sea to such other port:—

Held, that the expression "coastwise" used in s. 9 of the schedule to the Act of 1910 must be construed in its ordinary sense, unaffected by the definition in s. 13, sub-s. 5, of the Port of London Act, 1908; that the expression "by sea only" in s. 9 is there used, not in contradistinction to "by river," but in contradistinction to "by land"; and therefore that goods imported into the Port of London from beyond the seas, transhipped there, and conveyed by barge to

DOCKS—*continued.*

the port of Rochester are exempt from the payment of port rates to the Port of London Authority. BRITISH OIL AND CAKE MILLS, LIMITED *v.* PORT OF LONDON AUTHORITY - **Pickford J. 5**

2. —— *Port Rates—Exemption—Goods imported for Transhipment only—Oil in Bulk—Oil imported by particular Steamer mixed with other Oil—Reshipment of Portions of Oil in Bulk—Goods reshipped "as soon as practicable"—Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68), *ss.* 13, 15—*Port of London (Port Rates on Goods) Provisional Order Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c. c.*). *Schedule*, *s.* 9.

By s. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, goods imported for transhipment only are exempt from port rates, and it is provided that "for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved . . . . (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter . . . . and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port. Every such certificate as aforesaid shall be under the hand of the owner of the goods . . . . and shall be in such form as the Authority may from time to time require. The certificate stating that the goods have been intended for transhipment shall contain particulars of the description quantity destination route and mode of conveyance of such goods . . . . The certificate stating that the goods have been shipped again as soon as practicable as aforesaid shall contain such particulars as the Authority shall require . . . ."

The plaintiffs received in the Port of London from beyond the seas a large quantity of oil in bulk by their ocean tank steamer *Narragansett*. When that steamer was reported at the Custom House the plaintiffs intended to tranship to various ports in the United Kingdom specific quantities of the oil she brought, and they accordingly delivered to the defendants inwards port rates exemption certificates under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, shewing the quantity in tons they intended to tranship to each port. The oil from the *Narragansett* was discharged into the plaintiffs' tanks at Purfleet, some of which were empty at the time, and some contained oil intended for distribution in the London district and also oil discharged from previous steamers. From these tanks the plaintiffs subsequently loaded the various quantities of oil mentioned in the inwards port rates exemption certificates, and conveyed them by small tank steamers to the ports mentioned in those certificates. The plaintiffs then delivered to the defendants outwards port rates exemption certificates for the oil so transhipped and claimed exemption from the payment of port rates in respect thereof. The defendants

DOCKS—*continued.*
refused to admit the plaintiffs' claim for exemption on the ground, inter alia, that as the oil brought by the *Narragansett* had been mixed in the tanks with other oil not intended for transhipment, the identity of the oil transhipped with that imported could not be certified and proved so as to comply with s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910 :—

Held, that the oil transhipped had been sufficiently identified with that certified for transhipment, and therefore that the plaintiffs were entitled to the exemption claimed.

Held, further, that the expression "shipped again as soon as practicable" in s. 9 means shipped again in the ordinary course of navigation and having regard to the facilities of the port, and does not mean shipped again as soon as practicable having regard to the convenience of the merchant's business. ANGLO-AMERICAN OIL COMPANY, LIMITED *v.* PORT OF LONDON AUTHORITY - - - - **Pickford J. 14**

DOGS—*Savage Dog—Dog kept by Daughter in Father's House—Liability of Father for Injuries inflicted by it.*

A father allowed his daughter, aged seventeen, who resided with him, to keep in his house a dog which he knew to be savage. The dog was her property, and she paid for its food and licence out of her earnings. While so kept there it attacked and killed a valuable dog belonging to a third person :—

Held that, as the daughter was of a sufficient age to allow of her exercising control over her dog, her father was not responsible for the damage done. NORTH *v.* WOOD - **Div. Ct. 629**

"DOMESTIC PURPOSES"—Water—Supply—London—Trade purposes—Public-house—Catering business - - - **221**
See WATER.

DUTY—Inland Revenue.
See under REVENUE.

EDUCATION.
See under SCHOOLS.

EDUCATION (ADMINISTRATIVE PROVISIONS) ACT, 1911, s. 3 - 505
See LONDON. 1.

ESTATE DUTY.
See under REVENUE.

EVIDENCE—Appeal from referee—Oral evidence on appeal—Revenue—Increment value duty - - - - - - **339**
See REVENUE. 6.

—— Bastardy — Corroboration — Conviction for having had unlawful carnal knowledge—Proof of conviction - - - **1**
See BASTARDY.

—— Criminal law—Unlawful carnal knowledge of girl under sixteen—Evidence of previous offence against the same girl — Previous offence more than six months before commencement of prosecution—Validity - - - **414**
See CRIMINAL LAW. 3.

EVIDENCE—*continued.*
—— Factory Acts—Notice to be affixed in factory—Proof of contents—Admissibility of secondary evidence - **105**
See FACTORY ACTS.

—— Order in Council, Omission to prove—Extradition—Habeas corpus—Jurisdiction of committing magistrate - **77**
See EXTRADITION.

—— Statute—Construction—Admissibility **641**
See REVENUE. 10.

EXECUTOR —Joinder of causes of action—Claim by executor—Personal claim - **283**
See PRACTICE. 2.

EXTRADITION—*Habeas Corpus—Jurisdiction of Committing Magistrate—Evidence—Omission to prove Order in Council—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 2, 10.

A police magistrate committed a fugitive criminal to prison with a view to his extradition to Italy. There was an Order in Council applying the Extradition Act, 1870, in the case of Italy, but the Order was not formally proved before the magistrate, he being aware of its existence. A rule nisi for a writ of habeas corpus for the discharge of the prisoner having been obtained on the ground that in the absence of proof of the Order in Council the magistrate had no jurisdiction to make the order of committal :—

Held, discharging the rule, that the mere omission to give formal proof of the Order in Council, which contained nothing that could assist the prisoner, did not entitle the prisoner to be released.

Per Scrutton and Bailhache JJ. : The Order in Council should be given in evidence before the committing magistrate. THE KING *v.* GOVERNOR OF BRIXTON PRISON, *Ex parte* SERVINI - - - - - **Div. Ct. 77**

FACTORY ACTS—*Offence—Times allowed for Meals—Notice to be affixed in Factory—Proof of Contents—Admissibility of Secondary Evidence—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 32, 33, 128.

On the prosecution of the occupier of a factory for allowing a young person employed in the factory to remain in a room in which a manufacturing process was being carried on during the time allowed for meals, contrary to s. 33 of the Factory and Workshop Act, 1901, secondary evidence is admissible to prove the contents of the notice specifying the times allowed in the factory for meals, which notice has under s. 32 to be affixed in the factory, although there has been no notice to produce the original notice.

Mortimer v. *M'Callan* (1840) 6 M & W. 58 followed and applied. OWNER *v.* BEE HIVE SPINNING COMPANY, LIMITED - **Div. Ct. 105**

FALSE IMPRISONMENT—*Defence to Action for—Arrest without Warrant by Private Individual—Felony for which Plaintiff arrested not committed—Other Felonies committed by some Person other than Plaintiff—Reasonable and Probable*

FALSE IMPRISONMENT—*continued.*
Cause to suspect Plaintiff of having committed the other Felonies.
A private person can only justify an arrest by him of another on suspicion of having committed a felony if he can shew that the particular felony for which he arrested the other had in fact been committed, and that he had reasonable and probable cause for suspecting the other of having committed it. WALTERS *v.* W. H. SMITH & SON, LIMITED
Sir Rufus Isaacs C.J. 595

FALSE WARRANTY—Sale of food and drugs—Adulteration - - - - **270**
See ADULTERATION.

FELONY—False imprisonment — Defence to action for—Arrest without warrant
See FALSE IMPRISONMENT. **595**

FINANCE ACTS.
See under REVENUE.

FIRE—Ship—Fire caused by unseaworthiness—"Actual fault or privity" of owners
See SHIPPING. 4. **419**

—— Shipping—Bill of lading—Fire caused by unseaworthiness — Fire happening without actual fault or privity—Shipowner's liability - - - - **541**
See SHIPPING. 1.

FLOCK—Rag flock.
See under RAG FLOCK.

FOOD AND DRUGS—Sale of—Adulteration.
See under ADULTERATION.

FOREIGN CORPORATION — Service of writ within jurisdiction—Carrying on business—Agents in England—No authority to contract - - - - - **715**
See PRACTICE. 1.

FOREIGN LANGUAGE—Translation from—Copyright—Literary work — Author—Advertisement - - - - **622**
See COPYRIGHT. 1.

FORGED STAMPS—Sale of—Stamps cancelled before sale—Stamp Duties Management Act, 1891, s. 13 - - - **144**
See CRIMINAL LAW. 2.

GAMING—*Cheques given for Racing Bets—Cheques paid by Payee into his Bank—Claim against Payee as "Holder" to recover back Amount of Cheques — Whether Bank an "Indorsee"—Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2.
Sect. 1 of the Gaming Act, 1835, provides that certain securities, which by previous statutes would have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration.
Sect. 2: "In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is [by certain statutes] declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as afore-aid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law . . ."
The plaintiff, in payment of certain racing bets, gave the defendant five cheques for the amount. The cheques were made payable to the defendant or order and crossed, and were paid by the defendant into his bank. There was no evidence that the defendant's banking account was overdrawn. The plaintiff subsequently sought to recover back the amount of the cheques from the defendant under s. 2 of the Gaming Act, 1835:—
Held, that the action failed inasmuch as (1.) the defendant was not the "holder" of the cheques within s. 2 of the Act of 1835, and (2.) it must be inferred that the bank into which the defendant paid the cheques merely collected same for defendant and was therefore not an "indorsee" within the meaning of s. 2.
Whether the plaintiff could have recovered under the section if the defendant had paid the cheques to his bankers in the character of holders in their own right, and not in the character of agents for collection merely, *quære*. NICHOLLS *v.* EVANS - - - - **Channell J. 118**

GARNISHEE ORDER—Attaching rent due—Mortgage—Second mortgagee—Receiver—Priority - - - - - - **693**
See MORTGAGE.

GOODS—Carriage of goods—Railway.
See under RAILWAY.

—— Sale of goods.
See under SALE OF GOODS.

GRAMOPHONE RECORDS—Copyright—Musical work—Infringement—Royalties - **395**
See COPYRIGHT. 2.

HABEAS CORPUS—Jurisdiction of committing magistrate — Evidence — Omission to prove Order in Council - - **77**
See EXTRADITION.

HIGHWAY—Telegraph—Placing posts and wires in or across street or public road — Highway not repairable by inhabitants at large - - - - - - **564**
See TELEGRAPH.

HIRE AND PURCHASE—Contract or option to buy—Pledge—Conversion—Measure of damages—"Person having agreed to buy" - - - - - - - **244**
See SALE OF GOODS.

HOARDINGS—Building operations—Hoardings for protection of passengers in street—Necessity for licence of borough council—Exemption of school buildings - **505**
See LONDON. 1.

HOLIDAY — Shop assistant — Weekly half-holiday.
See under SHOPS.

HOUSE DUTY.
See under REVENUE.

HOUSES OF WORKING CLASSES, ENGLAND, RULES, January 11, 1910, rr. 1, 4, 5, 8, 9. - - - - - **160**
See LOCAL GOVERNMENT BOARD.

HOUSING, TOWN PLANNING, &c. ACT, 1909, ss. 17, 39 - - - - - - **160**
See LOCAL GOVERNMENT BOARD.

IMPRISONMENT—False.
See under FALSE IMPRISONMENT.

INCOME TAX.
See under REVENUE.

INCREMENT VALUE DUTY—Inland Revenue
See REVENUE. 6. **339**

—— Substituted site value—Interest in land—Mortgage—Mode of calculation - **528**
See REVENUE. 7.

"INDORSEE"—Gaming—Cheques given for racing bets — Whether bank an "indorsee" - - - - - - **118**
See GAMING.

INFANT—*Wilful Neglect by Parent—Children—Injury to Health—Failure to provide adequate Medical Aid—Refusal to Permit an Operation—Offence—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1.

Under s. 12, sub-s. 1, of the Children Act, 1908, it is an offence if the parent of a child wilfully neglects the child in a manner likely to cause injury to the child's health, and if a parent fails to provide "adequate medical aid" for his child he "shall be deemed to have neglected him in a manner likely to cause injury to his health."

The respondent's daughter, aged thirteen, was suffering from adenoids and in consequence her health was being injured. The only possible remedy was a surgical operation for the removal of the adenoids. The operation was not a dangerous one, but the respondent refused to allow his daughter to undergo it. He was summoned for an offence under the above section, and the justices dismissed the information on the ground that the respondent was under no legal liability to allow the operation:—

Held, that the refusal of a parent to allow his child to undergo an operation might constitute a failure to provide adequate medical aid within the meaning of s. 12, sub-s. 1, of the Act; that the question was one of fact to be decided on the evidence in each particular case, consideration being had to the nature of the operation and the

INFANT—*continued.*
reasonableness of the parent's refusal to allow it; and that on the above facts the respondent might have been convicted. OAKEY *v.* JACKSON **Div. Ct. 216**

—— Criminal law—Girl under age of sixteen years—Unlawful carnal knowledge—Causing or encouraging—Knowingly allowing - - - - - - **137**
See CRIMINAL LAW. 1.

—— Education.
See under SCHOOLS.

—— Schools.
See under SCHOOLS.

INFRINGEMENT—Copyright.
See under COPYRIGHT.

INHABITED HOUSE DUTY.
See under REVENUE.

INLAND REVENUE.
See under REVENUE.

INN.
See under PUBLIC-HOUSE.

INSPECTOR—Report of—Confidential document—Right of appellant to be heard
See LOCAL GOVERNMENT BOARD. **160**

INSTITUTE TIME CLAUSES—"Inchmaree" Clause — Time policy—"Perils of the sea" - - - - - - - **442**
See INSURANCE (MARINE).

INSURANCE — Income tax — Deductions — Brewery business — Tied houses — Repairs—Insurance premiums - **357**
See REVENUE. 3.

INSURANCE (MARINE) — *Time Policy — "Perils of the seas"—Institute Time Clauses—"Inchmaree" Clause—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *Sched. I., r.* 12.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke causing the boiler to fall into the hold of the ship, damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached:—

Held, that the loss was not recoverable under the policy as it was not caused by a peril of the sea, nor was it within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the risks insured by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy. STOTT (BALTIC) STEAMERS, LIMITED *v.* MARTEN **Pickford J. 442**

JOINDER—Practice—Joinder of causes of action—Claim by executor—Personal claim
See PRACTICE. 2. **283**

JURISDICTION—Justices.
See under JUSTICES.

JURISDICTION— Sale of food and drugs—False warranty—Omission to serve copy of analyst's certificate with summons **270**
See ADULTERATION.

—— Service of writ within jurisdiction—Foreign corporation—Carrying on business—Agent in England—No authority to contract - - - - - - **715**
See PRACTICE. 1.

—— Shipping—Seaman—Wages—"Order final"—Appeal — Special case — Summary jurisdiction - - - - - **616**
See SHIPPING. 6.

JURY—Practice—Trial by jury—General verdict—Further question asked by judge of jury—Judgment entered in accordance with answer - - - - - **512**
See PRACTICE. 3.

JUSTICES—*Jurisdiction — Court consisting of Stipendiary Magistrate and another Justice of the Peace—Magistrates differing in Opinion—Stipendiary Magistrate adjudicating alone — Acquiescence by Second Magistrate.*

The applicant was summoned before a Court of summary jurisdiction for a contravention of the Pawnbrokers Act, 1872. The Court consisted of the stipendiary magistrate for the district and another justice of the peace. At the conclusion of the evidence the second justice, in a private discussion of the case with the stipendiary magistrate, said that the evidence was not in his view such as would justify a conviction. The stipendiary magistrate, being satisfied that the case was fully made out against the applicant, stated his view to the second justice and added the following words: "I must then take upon myself the burden of adjudicating in this case alone." The second justice said "Very well," whereupon the stipendiary magistrate ordered the applicant to pay a fine and costs, adding that he alone was responsible for the decision and that the second justice was not in any way a party thereto:—

Held, that as the stipendiary magistrate had jurisdiction to decide the case by himself, and that as what took place amounted to a withdrawal by the second justice from taking any part in the decision, the conviction of the applicant by the stipendiary magistrate alone was valid. THE KING *v.* THOMAS. *Ex parte* O'HARE **Div. Ct. 32**

2. —— *Power to state Case—Application for Cinematograph Licence—Justices "sitting in petty sessions" — Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *ss.* 2, 5, 6.

By s. 2 of the Cinematograph Act, 1909, county councils are empowered to grant cinematograph licences, and by s. 5 it is provided that a county council may "delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act."

Sect. 6 enacts that the provisions of the Act

JUSTICES—*continued.*

are to apply in the case of a county borough as if the borough council were a county council:—

Held, that justices sitting in petty sessions to whom the powers of a county or borough council under the Act have been delegated do not, when exercising such powers, sit as a Court of summary jurisdiction, and, therefore, that they have no power to state a case for the opinion of the Court under the Summary Jurisdiction Acts. HUISH *v.* LIVERPOOL JUSTICES - **Div. Ct. 109**

—— Adulteration—Sale of food and drugs.
See under ADULTERATION.

—— Bastardy.
See under BASTARDY.

—— Bread Act, 1836—Disqualification of magistrate—Knowledge of facts disqualifying - - - - - - - **608**
See CROWN OFFICE.

—— Children—Wilful neglect by parent—Failure to provide adequate medical aid—Refusal to permit an operation—Offence - - - - - - **216**
See INFANT.

—— Criminal law.
See under CRIMINAL LAW.

—— Disqualification, Statutory — Coal Mines Act, 1911 — Certiorari — Acquittal — Justice of the peace - - - **66**
See CERTIORARI.

—— Education.
See under SCHOOLS.

—— Extradition—Habeas corpus—Jurisdiction of committing magistrate—Evidence—Omission to prove Order in Council - **77**
See EXTRADITION.

—— Factory Acts.
See under FACTORY ACTS.

—— Hoardings for protection of passengers in street—Necessity for licence of borough council—Building operations - **505**
See LONDON. 1.

—— Infant.
See under INFANT.

—— Licensing Acts.
See under LICENSING ACTS.

—— Lodging-houses.
See under LODGING-HOUSES.

—— Market.
See under MARKET.

—— Motor car.
See under MOTOR CAR.

—— Rag flock—'Rags"—Meaning - - **253**
See RAG FLOCK.

—— Sale of food and drugs—Adulteration.
See under ADULTERATION.

JUSTICES—*continued.*
—— Schools.
See under SCHOOLS.

—— Shipping—Persuading seaman to desert—Articles not signed—"His ship" - **462**
See SHIPPING. 5.

—— Shipping — Seaman — Wages — Summary jurisdiction—"Order final"—Appeal—Special case - - - - - **616**
See SHIPPING. 6.

—— Shops.
See under SHOPS.

—— Tobacco, Manufacturer of—Decrease in weight—Offence - - - - **313**
See REVENUE. 10.

LAMP—Motor car—Bicycle—Motor cycle - **51**
See MOTOR CAR. 2.

LAND—Increment value duty—Substituted site value—Interest in land—Mortgage—Mode of calculation - - - **528**
See REVENUE. 7.

—— Undeveloped land duty—Agricultural land—Power to determine tenancy for certain purposes—Conditional power **515**
See REVENUE. 11.

—— Undeveloped land duty—Person chargeable—Owner for the time being - **327**
See REVENUE. 12.

LAY DAYS—Shipping— Charterparty—Sunday included in despatch days - - **304**
See SHIPPING. 2.

LEASE—Reversion duty — Determination of lease—"Nominal rent" - - **641**
See REVENUE. 9.

LICENCE—Building operations—Hoardings for protection of passengers in street—Necessity for licence of borough council—Exemption of school buildings **505**
See LONDON. 1.

LICENSING ACTS—*Closing Hours—Guest of Lodger—Using Licensed Premises for Purpose of obtaining Liquor—Guest unlawfully on Licensed Premises—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 62, *sub-s.* 1.

A lodger at an hotel invited the appellant, who was his cousin and was not lodging in the hotel, to come with him into the hotel after closing hours in order to have a drink as it was a cold night, and he was leaving the hotel the next morning. The appellant entered the hotel and was supplied with intoxicating liquor on the order, and at the expense, of the lodger. Upon an information charging the appellant, under s. 62, sub-s. 1, of the Licensing (Consolidation) Act, 1910, with being unlawfully on the licensed premises at a time when they were required by law to be closed:—

Held, that the justices were entitled to find that the appellant entered and was upon the licensed premises at the invitation of the lodger for the purpose of obtaining intoxicating liquor and that he was unlawfully on the premises and was liable to be convicted under s. 62, sub-s. 1, of the Act.

For the purposes of s. 62, sub-s. 1, of the Act there is no distinction between the position of a lodger on the licensed premises and a bona fide traveller.

Pine v. *Barnes* (1887) 20 Q. B. D. 221 distinguished.

Jones v. *Jones* [1910] 2 K. B. 262 followed. ATKINS *v.* AGAR - - **Div. Ct. 26**

2. ——*Compensation Levy—"Old on licence"—Forfeiture—Grant to Assignee at Special Sessions—"Transfer"—"Licence in force on August* 15, 1904"—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 15—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 21, 23; *Sched. II., Part I.*

By s. 21 of the Licensing (Consolidation) Act, 1910, the compensation authority shall (except as therein mentioned) impose in respect of all old on licences renewed in respect of premises within their area charges at rates therein specified, to be levied and paid as part of the duties on the corresponding excise licence.

By s. 23, sub-s. 1, a transfer of a justices' licence is the grant of a justices' licence to one person in substitution for another person who holds or has held the licence. By sub-s. 2 (*a*) a transfer can only be authorized in the cases and to the persons mentioned in Sched. IV. to the Act, including the case where the owner of licensed premises or some person on his behalf on the forfeiture of the licence has obtained temporary authority to carry on business until the next transfer sessions and applies for a transfer at those sessions; in which case the transfer may be granted to the owner or any person applying on his behalf, as if the licence to be transferred were, notwithstanding forfeiture, still valid.

In Sched. II., Part I., to the Act "old on licences" are described as "justices' on licences which were in force on August 15, 1904, including (*a*) licences granted by way of renewal of a licence so in force . . . . whether the licence continues to be held by the same person or has been . . . . transferred to any other person or persons."

The suppliant was since 1911 the holder of a licence in respect of a certain house and thereby authorized to sell intoxicating liquors for consumption either on or off the premises. A licence in respect of the same house granted before 1904 had been renewed year by year, and a renewed licence was in force on July 18, 1907. On that date the then holder was convicted of felony. The owners of the house through their agent applied for and obtained under s. 15 of the Licensing Act, 1874, and s. 14 of the Alehouse Act, 1828, authority to carry on the business until the next special sessions. On application to those sessions a licence was granted to the owners' agent which remained in force until the next general

LICENSING ACTS—*continued.*

annual licensing meeting, at which the owners' agent was granted, by way of renewal of the licence then held by him, a licence which had been continuously renewed until it was transferred on June 26, 1911, to the suppliant.

In January, 1911, the compensation authority acting under s. 21 of the Licensing (Consolidation) Act, 1910, imposed a compensation levy in respect of all old on licences renewed within their area. In respect of this levy the Excise officer demanded of the suppliant, who under protest paid, the sum of 20*l.* The suppliant claimed to recover this sum on the ground that the forfeiture in 1907 prevented his licence from being one which was in force on August 15, 1904, within the meaning of Sched. II., Part I., and therefore from being an "old on licence" within the meaning of s. 21 :—

Held, that the authority and licence granted to the owners' agent in 1907 were a transfer within the meaning of the Licensing Act, 1904, and were therefore a "transfer" within the meaning of s. 23 of the Act of 1910 ; that the licence had been "transferred" to the owners' agent within the meaning of Sched. II., Part I., and that it was therefore in force on August 15, 1904, within the meaning of that enactment ; and that the levy was properly made.

Freer v. *Murray,* [1894] A. C. 576, and *Tower Justices* v. *Chambers,* [1904] 2 K. B. 903, discussed. WERNHAM *v.* THE KING

Bailhache J. 468

LOCAL GOVERNMENT BOARD—*Powers and Duties — Closing Order — Refusal of Local Authority to determine—Appeal—Public Local Inquiry — Report of Inspector — Confidential Document—Right of Appellant to be heard—Housing, Town Planning, &c. Act,* 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39—*Housing of Working Classes, England, Rules, January* 11, 1910, *rr.* 1, 4, 5, 8, 9.

By s. 17, sub-s. 6, of the Housing, Town Planning, &c. Act, 1909, if, on the application of an owner of a dwelling-house, a local authority, which has made a closing order under sub-s. 2, refuse to determine the order, the owner may appeal to the Local Government Board.

By s. 39 of the Act the procedure on any such appeal shall be such as the Local Government Board may by rules determine : provided that the rules shall provide that the Board shall not dismiss any appeal without having first held a public local inquiry.

By rules made under this section it is provided that every appeal to the Local Government Board shall be made to and brought before the Board by means of a letter or other representation in writing, and that the Board shall not dismiss an appeal without having first held a public local inquiry.

The owner of a dwelling-house applied to a local authority to determine a closing order which had been made in respect thereof and on the refusal of the local authority to do so appealed to the Local Government Board. A public local inquiry was directed to be held

LOCAL GOVERNMENT BOARD—*continued.*

by an inspector appointed by the Board, who after holding the inquiry and after a personal inspection of the premises made certain reports to the Board. The Board dismissed the appeal without having disclosed to the appellant the contents of their inspector's reports and without having given him an opportunity of being heard by the member of the Board who was going to determine the appeal.

On an application to quash the order of the Board dismissing the appeal on the ground that the appeal had not been determined in manner provided by law :—

Held by Vaughan Williams and Buckley L.JJ. (Hamilton L.J. dissenting), that it was contrary to the principles of natural justice for the Board to dismiss the appeal without disclosing to the appellant the contents of their inspector's reports, and without giving the appellant an opportunity of being heard (not necessarily viva voce) by the Board in support of the appeal, and that the order of the Board dismissing the appeal must, therefore, be quashed.

Decision of the Divisional Court [1913] 1 K. B. 463, reversed. THE KING *v.* LOCAL GOVERNMENT BOARD. *Ex parte* ARLIDGE

C. A. 160

LODGING-HOUSES—*Common Lodging-house—Lodgers sleeping in Separate Rooms—No Common Eating Room—Necessity for Licence to keep—London County Council (General Powers) Act,* 1902 (2 *Edw.* 7, *c. clxxiii.*), *Part IX.*

In order to constitute a "common lodging-house" there must be community of accommodation for either sleeping or eating. LONDON COUNTY COUNCIL *v.* HANKINS - **Div. Ct. 490**

LONDON—*Building Operations—Hoardings for Protection of Passengers in Street—Necessity for Licence of Borough Council—Metropolis Management Act,* 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 121, 122, *and* 123 — *Exemption of School Buildings—Education (Administrative Provisions) Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 32), *s.* 3.

The licence of the borough council under s. 122 of the Metropolis Management Act, 1855, for the erection of a hoarding in a street is required in the case of all hoardings erected under s. 121 of that Act.

Sects. 121, 122, and 123 of that Act are not provisions "dealing with the construction of new buildings" within the meaning of s. 3 of the Education (Administrative Provisions) Act, 1911, and school buildings though built in accordance with plans approved by the Board of Education are not exempted from their operation. HIGGS AND HILL, LIMITED *v.* STEPNEY BOROUGH COUNCIL - **Div. Ct. 505**

2. —— *Rates — Parliamentary Borough — Tenement wholly let out in Apartments or Lodgings—Abatements or Allowances—Surcharge by Auditor—Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act,* 1869 (32 *&* 33 *Vict. c.* 41), *ss.* 3, 4.

The council of a metropolitan borough,

LONDON—*continued.*
which became a parliamentary borough some years after the passing of the Representation of the People Act, 1867, rated the owners of two dwelling-houses which were wholly let out in apartments or lodgings not separately rated, and allowed them the commissions or abatements authorized by the Poor Rate Assessment and Collection Act, 1869. The local government auditor at his audit made a surcharge on the rate collector in respect of the amount of these abatements :—

Held, reversing the decision of a Divisional Court, that the words "all boroughs" in s. 7 of the Representation of the People Act, 1867, extended to all boroughs which had since the passing of that Act become parliamentary boroughs and were not limited to boroughs which were in existence as parliamentary boroughs at the date of its passing ; that the owners ought to have been rated under that section and were therefore not entitled to any commission, abatement, or deduction from the amount of the rate ; and that the surcharge was therefore rightly made by the auditor.

White & Hales v. *Islington Corporation* [1909] 1 K. B. 133 considered.

West Ham Churchwardens v. *Fourth City Mutual Building Society* [1892] 1 Q. B. 654 distinguished. THE KING *v.* ROBERTS **C. A. 369**

—— Common lodging-houses—London County Council (General Powers) Act, 1902
See LODGING-HOUSES. **490**

—— Port of London—Port rates—Exemption—Goods imported for transhipment only
See DOCKS. 1, 2. **5, 14**

—— Water.
See under WATER.

LONDON COUNTY COUNCIL (GENERAL POWERS) ACT, 1902, Part IX. 490
See LODGING-HOUSES.

MAGISTRATES.
See under JUSTICES.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARKET—*Tollable Goods — Contract of Sale made beyond Market Limits—Delivery within Limits—Property not passing till Delivery—Whether Toll payable — Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.

By s. 13 of the Markets and Fairs Clauses Act, 1847, any person who shall "sell" tollable articles at any place within the prescribed limits of a market except in his own dwelling place or shop is guilty of an offence.

A farmer at his own dwelling-house agreed to sell to a butcher two specific pigs at a certain price per score. By the terms of the contract the pigs were to be killed and delivered by the seller and were to be at his risk until delivery. A few days later he killed and delivered the pigs at the purchaser's shop, which was within the market limits. Dead pigs were tollable articles :—

Held, that the word "sell" in s. 13 is to be understood in a popular and not its strict legal sense ; that for the purposes of that section the pigs were sold where the agreement was made notwithstanding that the property did not then pass ; and that the seller had consequently not committed an offence within the section. LAMBERT *v.* ROWE **Div. Ct. 38**

MAXIM—"Nemo debet bis vexari pro una et eadem causa" - - - - - **66**
See CERTIORARI.

MEDICAL AID—Failure to provide adequate—Children—Wilful neglect by parent—Refusal to permit an operation—Offence
See INFANT. **216**

MERCHANDISE MARKS—*False Trade Description—"Fine British Tarragona Wine"—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

The respondents sold a bottle bearing the label "Fine British Tarragona Wine." The bottle did not contain Tarragona wine or anything like it, but a mixture composed as to 85 per cent. of a wine made and prepared in England from dried raisins, and as to 15 per cent. of Mistella, a heavy form of Tarragona wine made and used solely for blending purposes and not suitable for consumption by itself :—

Held, that the label on the bottle was a false trade description within s. 3 of the Merchandise Marks Act, 1887. HOLMES *v.* PIPERS, LIMITED - - - - - - **Div. Ct. 57**

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907, ss. 8, 25 - - - 221
See WATER.

MINE—*Coal Mine—Minimum Wage—Actual Daily Earnings of Workman—Method of ascertaining—Power of Joint District Board to make Rules—Inability of Workman to earn Minimum Wage—Circumstances beyond his Control—Rule requiring Notice to Official—Regularity and Efficiency of Work—South Wales District Rules—Coal Mines (Minimum Wage) Act*, 1912 (2 *Geo.* 5, *c.* 2).

The purposes for which a joint district board are empowered under the Coal Mines (Minimum Wage) Act, 1912, to make general district rules do not include the provision of a method for ascertaining the rate of the actual daily earnings of the workmen. Therefore a rule which provided that "In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be

MINE—*continued.*
divided by the number of shifts and parts of shifts he has worked during such two weeks" was held to be ultra vires and void.

By s. 1, sub-s. 2, of the Act, "The district rules . . . . shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen." A joint district board made a rule that if a workman from circumstances over which he alleged he had no control was unable to perform such an amount of work as would entitle him to a sum equal to the daily minimum rate he must forthwith give notice thereof to the official in charge of the district, and in default of such notice should forfeit his right to wages at the minimum rate for that pay :—

Held, that the rule was authorized by s. 1, sub-s. 2.

Judgment of Pickford J. [1913] 3 K. B. 222 varied. DAVIES *v.* GLAMORGAN COAL COMPANY, LIMITED - - - - **C. A. 674**

—— Certiorari—Acquittal—Justice of the peace —Statutory disqualification — Coal Mines Act, 1911 - - - - **66**
See CERTIORARI.

—— Revenue—Mineral rights duty — Mineral way-leave—Way-leave over lessor's land for minerals not got from demised mines
See REVENUE. 8. **87**

MINERALS.
See under MINE.

MORTGAGE — *Second Mortgage — Mortgaged Property let to Tenant—Rent due from Tenant—Receiver appointed by Second Mortgagee — No Notice to Tenant of Appointment of Receiver—No Claim by Receiver to Rent — Judgment Creditor of Mortgagor—Garnishee Order attaching Rent due—Priority.*

Land in the occupation of a tenant at a rent was in 1908 with other properties mortgaged by the owner thereof to a second mortgagee, subject to a first mortgage. In March, 1911, the first mortgage became vested in the tenant, who at the same time received notice of the second mortgage. In April, 1911, the second mortgagee, under the Conveyancing Act, 1881, appointed a receiver of the properties comprised in his mortgage, and notice of the appointment was given to the mortgagor. The second mortgagee instructed the receiver to take no steps without further instructions. The receiver accordingly took no further steps and no further instructions were ever in fact given to him. No notice of the appointment was either then or at any subsequent time given to the tenant. In July, 1911, the plaintiffs recovered judgment against the mortgagor in the county court for a sum of money, and on March 25, 1912, the judgment being unsatisfied, the plaintiffs served a garnishee summons in the county court on the tenant to shew cause why he should not pay to them the half-year's rent due from him on that date. On March 28, 1912, the second mortgagee served notice on the tenant to pay

MORTGAGE—*continued.*
the rent to him. The receiver did not demand payment of the rent from the tenant, nor was he a party to the garnishee proceedings. The tenant, after deducting the interest due to him upon his mortgage, paid the balance of the rent into Court :—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that the notice by the second mortgagee to the tenant to pay the rent to him was inoperative, and that the plaintiffs were entitled as against the second mortgagee to the balance of the rent due from the tenant. VACUUM OIL COMPANY, LIMITED *v.* ELLIS. ELLISON, CLAIMANT, HOWARD, GARNISHEE - - - **C. A. 693**

—— Increment value duty — Substituted site value—Interest in land — Mortgage—Mode of calculation - - - **528**
See REVENUE. 7.

MOTOR CAR—*Building in which Petroleum Spirit for the Purposes of Light Locomotives is kept—User of Building as Dwelling—"Storehouse"—Regulations, dated July* 31, 1907, *made under s.* 5 *of the Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36).

By s. 5 of the Locomotives on Highways Act, 1896, "The keeping and use of petroleum or of any other inflammable liquid or fuel for the purpose of light locomotives shall be subject to regulations made by a Secretary of State . . . ."

By s. 7, "A breach of any . . . . regulation made under this Act . . . . may on summary conviction, be punished by a fine . . . ."

By regulation 4 made under the Act, "Where a storehouse forms part of, or is attached to, another building, and where the intervening floor or partition is of an unsubstantial or highly inflammable character . . . . the whole of such building shall be deemed to be the storehouse, and no such storehouse shall be used as a dwelling."

By the definition clause contained in the regulations, "The expression 'storehouse' shall mean any . . . . building . . . . in which petroleum spirit for the purposes of light locomotives is kept in pursuance of these regulations . . . ."

The respondent was tenant of premises which had formerly been a stable, with lofts above it, and the stable had been converted into a motor garage, the lofts being used as dwelling rooms, which were inhabited. The intervening floor between, which was of an unsubstantial character, consisted merely of a lath and plaster ceiling, broken in places, with wooden beams across, and had seven shafts in it. An ordinary wooden staircase surrounded by a casing of matchboarding connected the two, and was in the garage itself. On January 19, 1913, at 7.25 P.M. there were three motor cars in the garage ; one of these had just been driven in, and in the tank of it were seven inches of petroleum spirit. There was a two-gallon can of the spirit with the seal unbroken at the back of the car. One of the other cars had five inches of spirit in its

MOTOR CAR—*continued.*
tank, and the tank of the third was practically full. The garage was being used to house the cars for the night:—
Held, that the respondent had "kept" petroleum spirit in a "storehouse" within the meaning of the regulations, and was therefore liable to conviction under the Act for having committed a breach of them. APPLEYARD *v.* BANGHAM - - - - - - **Div. Ct. 258**

2. —— *Lamp—Motor Cars (Use and Construction) Order, 1904, art. II., condition 7 (i.)—Exemption—Bicycle—Motor Cycle.*
The definition of a motor car in art. I. of the Motor Cars (Use and Construction) Order, 1904, is such as to include a motor cycle. By art. II. no person shall use a motor car on a highway unless the conditions thereinafter set forth are satisfied. By condition 7 (i.) the lamp or lamps to be carried by a motor car must be of a certain specified description, "provided that . . . . this condition shall not extend to any bicycle, tricycle, or other machine to which s. 85 of the Local Government Act, 1888, applies":—
Held by Ridley and Bailhache JJ., Scrutton J. dissenting, that a motor cycle is not within the proviso, and is, therefore, bound to comply with condition 7 (i.). WEBSTER *v.* TERRY - - - - - - **Div. Ct. 51**

—— Shops—Weekly half-holiday—Exemptions—"Sale of motor cycle and air-craft supplies and accessories to travellers"
See SHOPS. 1. **35**

MOTOR CARS (USE AND CONSTRUCTION) ORDER, 1904, art. II., condition 7 (i.)
See MOTOR CAR. 2. **51**

MOTOR CYCLE—Lamp—Bicycle—Motor car **51**
See MOTOR CAR. 2.

MUSICAL WORK—Copyright.
See under COPYRIGHT.

NON-DELIVERY—Railway—Carriage of goods—Special contract—"Owner's risk"—"Non-delivery of any consignment"—Non-delivery of part of consignment
See RAILWAY. **263**

NON-PERFORMANCE—Contract, Non-performance of—Sale of goods—Broker receiving del credere commission—Solvent buyer—Liability of broker - - **449**
See PRINCIPAL AND AGENT.

NOTICE—Income tax—Additional assessment
See REVENUE. 4. **632**

OPERATION—Refusal to permit an—Children—Wilful neglect by parent—Failure to provide adequate medical aid—Offence
See INFANT. **216**

ORAL EVIDENCE.
See under EVIDENCE.

ORDER IN COUNCIL—Omission to prove—Extradition—Habeas corpus—Jurisdiction of committing magistrate—Evidence
See EXTRADITION. **77**

PARLIAMENTARY BOROUGH—London—Rates—Abatements or allowances—Surcharges by auditor - - - **369**
See LONDON. 2.

PETROLEUM SPIRIT—Motor car—"Storehouse" - - - - - - **258**
See MOTOR CAR. 1.

PLEDGE—Hire and purchase—Contract or option to buy—Conversion—Measure of damages—"Person having agreed to buy" - - - - - - - **244**
See SALE OF GOODS.

POLICY—Marine insurance.
See under INSURANCE (MARINE).

POOR RATE ASSESSMENT AND COLLECTION ACT, 1869, ss. 3, 4 - - - **369**
See LONDON. 2.

PORT OF LONDON—Docks—Port rates—Exemption—Goods imported for transhipment only - - - - - **5, 14**
See DOCKS. 1, 2.

POSTPONEMENT—County court—Practice—Postponement of trial—"Good cause"—Pendency of action in High Court raising similar issue - - - **241**
See COUNTY COURT.

PRACTICE—*Foreign Corporation—Service of Writ within Jurisdiction—Carrying on Business—Agent in England—No Authority to contract.*
The defendants were a foreign corporation carrying on business in Sweden as manufacturers. They employed as their sole agents in the United Kingdom a firm in London who also acted as agents for other firms and carried on business as merchants on their own account. The agents had no general authority to enter into contracts on behalf of the defendants, but they obtained orders and submitted them to the defendants for their approval. On being notified by the defendants that they accepted the orders the agents signed contracts with the purchasers as agents for the defendants. The goods were shipped direct from the defendants in Sweden to the purchasers. The agents in some cases received payment in London from the purchasers and remitted the amount to the defendants less their agreed commission:—
Held, that the defendants were not carrying on their business at the agents' office in London so as to be resident at a place within the jurisdiction, and that service of a writ on the agents at their office was, therefore, not a good service on the defendants.
Grant v. *Anderson* [1892] 1 Q. B. 108 followed.
Saccharin Corporation v. *Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 K. B. 516 distinguished. OKURA & CO., LIMITED *v.* FORSBACKA JERNVERKS AKTIEBOLAG **C. A. 715**

PRACTICE—*continued.*

2. —— *Joinder of Causes of Action—Claim by Executor—Personal Claim—Rules of the Supreme Court*, 1883, *Order XVIII., rr.* 1, 5, 7.

By Order XVIII., r. 5, "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

A tenant for life of a house granted a lease of it at a rent of 9*l.* a year, and the lease became vested in the defendant. A year's rent became due during the lifetime of the tenant for life. The tenant for life died, and the plaintiff, who was his sole executor, became entitled to the reversion expectant on the determination of the lease. Subsequently a half-year's rent became due. The plaintiff brought an action to recover possession of the house, and as executor and also in his personal capacity to recover 13*l.* 10*s.*, being the amount of the year's rent which accrued due in the lifetime of the tenant for life and the half-year's rent which accrued due subsequently:—

Held, that, as the claims by the plaintiff personally did not arise with reference to the estate of which he was executor, they could not be joined in the same action, and the order would be that the plaintiff should elect which claim he would proceed with, and failing such election that the proceedings in the action should be stayed. LORD TREDEGAR *v.* ROBERTS - - - - - - **C. A. 283**

3. —— *Trial by Jury—General Verdict—Further Question asked by Judge of Jury—Judgment entered in Accordance with Answer.*

When upon a trial before a judge and jury the jury have once given a general verdict, the judge is not entitled to ask any further question of the jury for the purpose of ascertaining whether the ground of their verdict was one which there was evidence to support. ARNOLD *v.* JEFFREYS - - **Div. Ct. 512**

—— County court.
See under COUNTY COURT.

—— Vexatious actions.
See under VEXATIOUS ACTIONS.

PREMIUMS—Insurance.
See under INSURANCE.

PRINCIPAL AND AGENT — *Sale of Goods—Broker receiving Del Credere Commission—Non-performance of Contract — Solvent Buyer—Liability of Broker.*

A broker who on a sale of goods to an undisclosed buyer receives a del credere commission from the seller is not liable to pay the seller for the goods if the buyer is solvent but has refused to pay for the goods on the ground that the seller has not duly performed the contract. The broker is liable to pay the seller only if, owing to the insolvency of the buyer or some other analogous cause, the seller is unable to recover the price from the buyer. THOMAS GABRIEL & SONS *v.* CHURCHILL & SIM **Pickford J. 449**

PRINCIPAL AND AGENT—*continued.*

—— Foreign corporation — Service of writ within jurisdiction — Carrying on business — Agent in England — No authority to contract - - - **715**
See PRACTICE. 1.

PRIORITY — Mortgage — Second mortgage — Receiver — Garnishee order attaching rent due - - - - - - **693**
See MORTGAGE.

PUBLIC-HOUSE — Brewery business — Tied houses — Income tax — Deductions — Repairs—Insurance premiums—Loss on rents—Legal expenses - - **357**
See REVENUE. 3.

—— Water — Supply — London — "Domestic purposes"—Trade purposes—Catering business - - - - - - **221**
See WATER.

RAG FLOCK—"*Rags*"—*Meaning*—*Rag Flock Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 52), *s.* 1, *sub-s.* 1.

Sect. 1, sub-s. 1, of the Rag Flock Act, 1911, prohibits the sale of flock manufactured from rags, unless the flock conforms to a standard of cleanliness prescribed by regulations made by the Local Government Board:—

Held, that the word "rags" in this section is not limited to rags which have become polluted through having been used in association with human or animal life, and that it includes cuttings from woven jute fabric cut away as waste in the process of manufacture. COOPER *v.* SWIFT - - - **Div. Ct. 253**

"**RAGS**"—Meaning.
See RAG FLOCK.

RAILWAY—*Carriage of Goods—Special Contract—"Owner's risk"—"Non-delivery of any consignment"—Non-delivery of Part of Consignment.*

The plaintiff delivered a consignment of goods to the defendants for carriage on their railway, at a reduced rate, upon the terms of a contract signed by him, which provided that the defendants should be relieved from "all liability for loss, damage, misdelivery, delay, or detention" unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made "within three days after delivery of the goods in respect of which the claim is made or, in case of non-delivery of any package or consignment, within fourteen days after despatch."

When the consignment arrived at its destination some of the goods were missing, and the plaintiff made a claim upon the defendants within fourteen days after the despatch of the consignment:—

Held, that non-delivery of a part of a consignment was "non-delivery" of the consignment, and not "loss," within the meaning

RAILWAY—*continued.*
of the contract, and that the plaintiff was entitled to recover damages. WILLS *v.* GREAT WESTERN RAILWAY COMPANY - **Div. Ct. 263**

RATES—London — Parliamentary borough — Abatements or allowances—Surcharge by auditor - - - - - - **369**
See LONDON. 2.

—— Port of London—Port rates—Exemption—Goods imported for transhipment only
See DOCKS. 1, 2. **5, 14**

RECEIVER — Mortgage—Second mortgage — Garnishee order attaching rent due
See MORTGAGE. **693**

RENTS—Income tax — Deductions — Brewery business—Tied houses—Loss on rents
See REVENUE. 3. **357**

—— Mortgage—Second mortgage—Receiver—Garnishee order attaching rent due—Priority - - - - - - **693**
See MORTGAGE.

REPAIRS—Income tax—Deductions—Brewer business—Tied houses - - - **357**
See REVENUE. 3.

REPRESENTATION OF THE PEOPLE ACT, 1867, s. 7 - - - - - **369**
See LONDON. 2.

REVENUE—*Estate Duty—Property passing on Death—Settled Property—Person entitled in Reversion—Presumed Date of Death—Aggregation—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 5, *sub-s.* 3—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 12, *sub-s.* 2.

Under s. 1 of the Finance Act, 1894, estate duty is payable in the case of every person dying after the commencement of Part I. of that Act, i.e., August 1, 1894, upon all property which passes on the death of such person; but by s. 5, sub-s. 3, in the case of settled property, where the interest of any person under a settlement fails or determines by reason of his death before it becomes an interest in possession and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

Sect. 12, sub-s. 2, of the Finance Act, 1900, provides that "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

By a marriage settlement made in 1864 a sum of money to which the wife was entitled in reversion subject to the successive life interests of her mother and father was assigned to trustees in trust to pay the income to the husband and wife for their lives and after the death of the survivor to stand possessed of the trust fund for such children of the marriage as the husband and wife or the survivor should appoint.

The wife died in 1876. Her mother and father died respectively in 1884 and 1888. The husband died in 1910, and on his death the Crown claimed that for the purpose of ascertaining the rate of the estate duty which then became payable the trust fund ought to be aggregated with other property passing on the husband's death in respect of which estate duty then became payable:—

Held, that if the wife had died after the commencement of Part I. of the Act of 1894 estate duty would then have been payable in respect of the trust fund, because, the deaths of the mother and the father having occurred before that date, the trust fund would have become an interest in possession before the wife's death, and that, therefore, by reason of s. 12, sub-s. 2, of the Finance Act, 1900, the claim of the Crown failed. ATTORNEY-GENERAL *v.* THYNNE - - **Scrutton J. 351**

2. —— *Income Tax—Assessment of Profits under Schedule (D)—Deprivation of Profits on which Computation made—Application to Commissioners for Relief—Power to state a Case—Appeal—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 134—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59.

An application to the Commissioners for General Purposes under s. 134 of the Income Tax Act, 1842, for the amendment of an assessment of profits, upon the ground that during the year of assessment the applicant has been deprived of or lost the profits or gains on which the computation of duty charged in the assessment was made, is not "an appeal" under the Income Tax Acts and is not within s. 59 of the Taxes Management Act, 1880, and consequently the Commissioners have no power to state a case under that section for the opinion of the High Court.

Decision of Scrutton J. [1914] 1 K. B. 152 affirmed. FURTADO *v.* CITY OF LONDON BREWERY COMPANY - - - - **C. A. 709**

3. —— *Income Tax—Schedule D.—Balance of Profits and Gains — Deductions — Brewery Business—Tied Houses — Repairs — Insurance Premiums—Loss on Rents—Legal Expenses—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2.

The appellants carried on the trade of brewers, and solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof were the owners of licensed houses which they let

REVENUE—*continued.*

to "tied" tenants, who, in consideration of the "tie," paid a rent less than the full annual value. These premises were not acquired or held as investments. By the tenancy agreements the tenants were bound to repair and to pay rates and taxes, but the appellants in fact did the repairs and paid the rates and taxes as a matter of commercial expediency and in order to avoid the loss of tenants. The appellants also, in respect of these houses, paid premiums on insurances against fire and loss of licences, and incurred legal expenses in connection with the renewal of the licences and other matters which did not relate to any extension of the business.

The appellants claimed that, in estimating the balance of the profits and gains of their business for the purpose of income tax, deductions ought to be allowed in respect of all the above expenses :—

Held, (1.) that the claim to deduct the cost of repairs to tied houses was governed by the decision in *Brickwood & Co.* v. *Reynolds* [1898] 1 Q. B. 95, and that the deduction could not be allowed ; (2.) that the deductions must be allowed in respect of all the other items as expenses necessarily incurred for the purpose of earning the profits and wholly and exclusively for the purposes of the trade. USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE - - - - - **Horridge J. 357**

4. —— *Income Tax—Schedule E—Additional Assessment—Notice — Demand for Payment—"Usual or last known place of abode"—Company—Managing Director—Company's Office—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 16 (*e*).

Sect. 16 (*e*) of the Taxes Management Act, 1880, provides that "all notices or forms required or allowed to be served on any person may be either delivered to such person or left at the usual or last known place of abode of such person."

The plaintiff was the manager of a limited company the registered office of which was in the city of London. The company did no business and the plaintiff only attended at the company's office on rare occasions. The Commissioners of Income Tax for the city of London made an additional assessment under Sched. E of the Income Tax Acts upon the plaintiff in respect of the salary paid to him as manager of the company. Notice of the assessment and a written demand for payment were left at the company's office, but were not received by, and did not come to the knowledge of, the plaintiff. The plaintiff not having paid the tax, a distress was levied in respect thereof at his dwelling-house :—

Held, that under the Income Tax Act, 1842, and the Taxes Management Act, 1880, notice of an additional assessment and a demand for payment must be given to the person sought to be charged ; that the company's office was not the plaintiff's "usual or last known place of abode" within s. 16 (*e*) of the Taxes Management Act, 1880, and that, therefore, no valid assessment had been made upon the plaintiff, and the distress was wrongful. BERRY *v.* FARROW - - - **Bankes J. 632**

5. ——*Income Tax—Super-tax—Assessment — Assessment under Sched. D for previous Year not conclusive for purposes of Super-tax—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

For the purpose of assessment to super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the sum at which the taxpayer has been assessed to income tax under Sched. D for the year preceding the year of assessment to super-tax is not conclusive and binding on the Special Commissioners, and the taxpayer may prove what was in fact his income for such preceding year.

So *held* by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting), affirming the decision of Horridge J. [1913] 3 K. B. 398.

Wylie Hill v. *Inland Revenue Commissioners,* 1912 S. C. 1246, approved. BROOKS *v.* INLAND REVENUE COMMISSIONERS **C. A. 579**

6. —— *Increment Value Duty—Sale of Fee Simple—Gross Value—Sale in "Open Market" by willing Seller—Special Adaptability to Needs of particular Purchaser—Appeal from Referee—Oral Evidence on Appeal—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

Sect. 25, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

The fee simple of a house to persons desirous of using it as a private residence was worth not more than 750*l.* The house, however, adjoined a nursing home the trustees of which desired to extend their premises, and it was advantageous to them to pay at least 1000*l.* for the house in question, and they in fact actually purchased it for that sum :—

Held, that the referee was right in fixing 1000*l.* as the gross value of the house for the purposes of the above sub-section.

The fact that on the hearing of the appeal from the referee the Court heard oral evidence is not to be taken as binding the Court to such a course in future. INLAND REVENUE COMMISSIONERS *v.* CLAY. INLAND REVENUE COMMISSIONERS *v.* BUCHANAN - **Scrutton J. 339**

7. —— *Increment Value Duty—Substituted Site Value—Interest in Land—Mortgage—Mode of Calculation — Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 2, 25.

For the purpose of obtaining the substitution of a previous site value for the original site value ascertained under s. 25 of the Finance (1909-10) Act, 1910, the amount secured by a mortgage must not be treated as a means of inferring what was the gross value

REVENUE—*continued.*

of the mortgaged land, but must itself be taken to be that value.

The original site value of the applicants' freehold house had been ascertained under s. 25 of the Finance (1909-10) Act, 1910. The original gross value was 800*l.* and the deductions to arrive at full site value were 610*l.*, leaving the original site value 190*l.* In December, 1898, the applicants had mortgaged the house for 800*l.*, and they now claimed under s. 2, sub-s. 3, that the value of the house at that date was 1200*l.*, on the footing that the mortgagees were trustees, and that it must be assumed that not more than two-thirds of the value were advanced on the security of the house. They contended that 1200*l.* was the original gross value of the house and that 273*l.* ought to be substituted for 190*l.* as the site value :—

Held (reversing the decision of Scrutton J.), that on the true construction of s. 2, sub-s. 3, of the Finance (1909-10) Act, 1910, the amount secured by the mortgage, namely, 800*l.*, must be taken as the gross value of the property at the date of the mortgage. HAYLLAR *v.* INLAND REVENUE COMMISSIONERS **C. A. 528**

—— Land duty—Undeveloped land duty.
See No. 12, below.

8. —— *Mineral Rights Duty—Mineral Way-leave—Way-leave over Lessor's Land for Minerals not got from Demised Mines—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 20, 24.

Sect. 20, sub-s. 1, of the Finance (1909-10) Act, 1910, imposes a duty called mineral rights duty on the rental value of all rights to work minerals and of all mineral way-leaves.

Sect. 20, sub-s. 2, provides that the rental value is to be taken to be, in the case of a mineral way-leave, the amount of rent paid by the working lessee in the last working year in respect of the way-leave.

Sect. 24 defines the expression "mineral way-leave" as "any way-leave . . . . or right to use a shaft granted to or enjoyed by a working lessee, whether above or under ground, for the purpose of access to or the conveyance of the minerals, or the ventilation or drainage of his mine or otherwise in connection with the working of the minerals."

The appellant demised the coal mines on her property to lessees who were also empowered to convey over roads or railways on the appellant's land coal worked by them in certain "foreign" mines, that is, mines not the property of the appellant, and in respect of this privilege the lessees had, by virtue of the lease, to pay a rent to the appellant. Some of the coal worked by the lessees in the foreign mines was brought to bank partly on the appellant's land and partly elsewhere :—

Held, that under s. 20 of the Finance (1909-10) Act, 1910, in the case of a mineral way-leave, mineral rights duty is payable on the amount of rent paid by the working lessee in respect of the way-leave whether that relates to minerals which are the property of

REVENUE—*continued.*

the person assessed or not, and, therefore, that mineral rights duty was payable by the appellant on the rent received by her from her lessees in respect of the right to convey coal from the foreign mines over her land. SHAWE STOREY *v.* INLAND REVENUE COMMISSIONERS **Scrutton J. 87**

9. —— *Reversion Duty — Determination of Lease—"Benefit accruing to the lessor"—Basis of Ascertainment — Building Agreement — Expenditure on Building by Lessee—"Payments made in consideration of the lease"—"Nominal rent"—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13—*Statute—Construction—Evidence—Admissibility.*

In 1891 W. agreed with the trustees of the C. estates to take a lease for forty years of a block of houses at a yearly rent of 125*l.*, but no lease was to be granted until W. had completed certain specified building operations upon the property. The works were completed at a cost of 6000*l.* and the lease was granted "in consideration of the expenses incurred by the lessee" in carrying out the works and of the rent and covenants reserved by the lease. In 1910 the lease was surrendered, and thereupon a claim for reversion duty arose under s. 13 of the Finance (1909-10) Act, 1910, which provides, by sub-s. 1, that on the determination of any lease of land, reversion duty shall be paid upon the value of "the benefit accruing to the lessor."

By sub-s. 2, that benefit is to be deemed to be the amount by which the total value of the land at the time the lease determines exceeds the total value of the land at the time of the original grant of the lease, "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)" :—

Held by the Court of Appeal, reversing the decision of Horridge J., that in assessing the reversion duty the total value of the land at the time of the original grant of the lease was not to be ascertained solely by capitalizing the rent, but that the sum of 6000*l.* expended by W. was a payment "made in consideration of the lease" within the meaning of the section, and must be taken into account.

Decision of Horridge J. on this point in *Stepney and Bow Educational Foundation* (*Governors*) v. *Inland Revenue Commissioners* [1913] 3 K. B. 570 overruled.

Per Phillimore L.J.: The words "nominal rent" in this section mean "a rent which suffices to express the relation of landlord and tenant, but gives no measure of value."

Whether the rent in this case was a "nominal rent" within the section, *quære.*

Expert evidence as to the meaning of ordinary English words in a modern Act of Parliament of general application is not admissible. MARQUIS CAMDEN *v.* INLAND REVENUE COMMISSIONERS . . . . . **C. A. 641**

REVENUE—*continued.*

10. —— *Tobacco, Manufacturer of—Possession of Tobacco which on being dried at Temperature of* 212 *deg. Fahr. decreases in Weight by more than* 32 *per cent.—Offence—Customs and Inland Revenue Act,* 1887 (50 *&* 51 *Vict. c.* 15), *s.* 4—*Finance Act,* 1904 (4 *Edw.* 7, *c.* 7), *s.* 3, *sub-s.* 2.

By s. 4 of the Customs and Inland Revenue Act, 1887, it is provided that if any manufacturer of tobacco shall have in his . . . . possession any tobacco . . . . and such tobacco shall on being dried at a temperature of 212 deg. Fahr. be decreased in weight by more than 35 (altered by the Finance Act, 1904, to 32) per cent., he shall be subject to a penalty, and the tobacco shall be forfeited.

Two officers of Customs and Excise visited the respondents' (who were manufacturers of tobacco) premises and took a sample of tobacco of about two ounces from a "cob" (i.e., a small truss weighing about 5 lbs.). The "cob" with several others was in a large tub which contained 60 or 70 lbs. of tobacco. Each of two portions of this sample when dried at a temperature of 212 deg. Fahr. was found to contain 33·7 per centum of moisture (i.e., 1·7 per centum in excess of the limit allowed by the statute). The two portions weighed about half an ounce each. The remainder of the sample was not tested. The sample did not in fact fairly represent the bulk of which it was intended to be a sample, and the tobacco in the tub as a whole did not contain more moisture than was allowed by law. The tobacco is ordinarily sold by the retailer by the ounce or half-ounce :—

Held, that the respondents had committed an offence under the section in respect of the ounce of tobacco which was found to contain more moisture than was allowed by law, inasmuch as the words "any tobacco" covered any quantity which was not too small to be recognized, or which was large enough to be dealt in by the public. HALE *v.* MORRIS & SONS, LIMITED - - - - **Div. Ct. 313**

11. —— *Undeveloped Land Duty — Agricultural Land—Lease made before April* 30, 1909—*Power to determine Tenancy for certain Purposes — Conditional Power — Lessor not desirous to resume Possession—Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 17, *sub-s.* 5.

By s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910, "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into before April 30, 1909, undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder. Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

REVENUE—*continued.*

In the absence of any bona fide intention of using the land for building or other purposes the lessor of agricultural land, held under a lease made before April 30, 1909, and containing a power for him to re-enter for building or other purposes, has no power to determine the lease within s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910 ; and the land is consequently not liable to undeveloped land duty.

By a lease of December, 1906, agricultural land was demised from September, 1904, for seven years. The lease continued a reservation to the lessors of "full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land." The Crown claimed from the lessors undeveloped land duty for the years 1910-11 and 1911-12 on the land comprised in the lease on the ground that they had "power to determine the tenancy" within the proviso to s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910. The Commissioners admitted that the lessors had not wanted any part of the land "for building or other purposes" before the termination of the lease :—

Held (reversing the decision of Scrutton J.), that inasmuch as the lessors had had no bona fide intention of using the land, the condition had not been fulfilled, and they had no power to determine the tenancy within s. 17, sub-s. 5. SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED *v.* INLAND REVENUE COMMISSIONERS **C. A. 515**

12. —— *Undeveloped Land Duty — Person chargeable—Owner for the Time being—Purchaser in Possession before Execution of Conveyance—Right of Appeal—Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *ss.* 19, 33, 41.

By s. 19 of the Finance (1909-10) Act, 1910, "undeveloped land duty shall be assessed" by the Commissioners of Inland Revenue "and shall be recoverable from the owner of the land for the time being." By s. 41 "the expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold."

The appellant, whose business was that of a land developer, bought some land and cut it up into plots, which were purchased by different persons under agreements providing for the payment of the purchase-money by instalments and for the execution of conveyances on the completion of the payments. The Commissioners made an assessment upon the appellant for undeveloped land duty in respect of these plots of land. At the date of the assessment the purchasers were in possession of their respective plots, but not having completed their payments had not received their conveyances. The appellant appealed to a referee against the assessment on the ground that he was not the owner of the plots of land and was, therefore, not liable to pay the duty. The referee by his award declared that the appellant was the owner and was liable.

REVENUE—*continued.*
From this decision the appellant appealed to the High Court:—
Held, that a person upon whom an assessment for undeveloped land duty is made is entitled under s. 33 of the Act to appeal against the assessment to a referee, and to appeal from the referee's decision to the High Court, on the question whether he is the owner of the land in respect of which the assessment has been made.
Held, also, that the purchasers and not the appellant were at the date of the assessment the owners of the plots of land within s. 41 of the Act, and that the assessment had, therefore, been wrongly made upon the appellant.
Lysaght v. *Edwards* (1876) 2 Ch. D. 499 followed and applied. ALLEN *v.* INLAND REVENUE COMMISSIONERS - **Scrutton J. 327**

—— Distress for tax—Tax charged upon premises—Income tax under Sched. A—Inhabited house duty—Goods of third person on the premises—Implement of trade - - - - - - - **288**
See DISTRESS.

—— Stamps, Sale of forged—Stamps cancelled before sale—Stamp Duties Management Act, 1891, s. 13 - - - - **144**
See CRIMINAL LAW. 2.

REVERSION DUTY—Determination of lease—"Nominal rent" - - - - - **641**
See REVENUE. 9.

ROYALTIES — Copyright — Musical work — Gramophone records — Infringement—Board of Trade regulations for "securing the payment of royalties" — Affixing adhesive label to record—Validity
See COPYRIGHT. 2. **395**

RULES OF THE SUPREME COURT, Order XVIII.—(*Joinder of Causes of Action*), *rr.* 1, 5, 7 - - - - - **283**
See PRACTICE. 2.

SALE—Food and drugs, Sale of—Adulteration.
See under ADULTERATION.

—— Goods, Sale of.
See under SALE OF GOODS.

—— Stamps, Sale of forged—Stamps cancelled before sale—Stamp Duties Management Act, 1891, s. 13 - - - - **144**
See CRIMINAL LAW. 2.

SALE OF GOODS—*Hire and Purchase—Contract or Option to buy—Pledge—Conversion—Measure of Damages—"Person having agreed to buy"—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2.
By s. 25, sub-s. 2, of the Sale of Goods Act, 1893, where a person having . . . . agreed to buy goods obtains, with the consent of the seller, possession of the goods . . . . the delivery or transfer by that person . . . . of the goods . . . . under any . . . . pledge . . . . to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall

SALE OF GOODS—*continued.*
have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . . with the consent of the owner.
By an agreement in writing the owners of a motor vehicle let it to certain hirers for twenty-four calendar months at the rate of 15*l.* 12*s.* 2*d.* per calendar month. On the signing of the agreement the hirers were to pay, and did pay, 50*l.* on account of hire in advance, and each subsequent payment was to be made in advance on specified dates. The hirers were not to relet, sell, or part with the vehicle without the consent in writing of the owners. If the hirers should on or before the expiration of the twenty-four calendar months be desirous of purchasing the vehicle they could do so by making the amount of hire paid equal to the amount of 426*l.* 11*s.* 6*d.* If the hirers did certain things, of which parting with the possession of the vehicle without the owners' consent in writing was one, it was made lawful for the owners and they were authorized to take possession of the vehicle and terminate the agreement.
During the currency of this agreement, there being a sum due and unpaid on account of hire, the hirers, without the consent of the owners, pledged the vehicle to a pledgee who took it in good faith and without notice of the owners' rights. Subsequently the owners, hearing of the pledge, demanded the vehicle from the pledgee, who refused to restore it. At the date of this demand and refusal there was a sum of 58*l.* 9*s.* due and unpaid on account of hire.
In an action by the owners against the pledgee:—
Held, that the effect of the agreement was that, having paid twenty-four instalments, the hirers had an option either to become purchasers of the vehicle or to return it and claim back the 50*l.* paid in advance, and that the agreement did not impose upon them an obligation to purchase the vehicle; that consequently the hirers were not persons "having agreed to buy" the vehicle within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and that the pledgee took no better title than the hirers had.
Helby v. *Matthews* [1895] A. C. 471 followed.
Lee v. *Butler* [1893] 2 Q. B. 318 distinguished.
Held, also, that the pledgee had an interest in the vehicle, and that therefore the measure of damages was not the full value of the vehicle but was only the value of the owners' interest therein, i.e., the amount of hire and purchase money remaining unpaid.
Brierly v. *Kendall* (1852) 17 Q. B. 937; *Chinery* v. *Viall* (1860) 5 H. & N. 288; and *Johnson* v. *Stear* (1863) 15 C. B. (N.S.) 330, applied. BELSIZE MOTOR SUPPLY COMPANY *v.* COX - - - - - - - **Channell J. 244**

—— Broker receiving del credere commission—Non-performance of contract—Solvent buyer—Liability of broker - - **449**
See PRINCIPAL AND AGENT.

SAVAGE DOG—Dog kept by daughter in father's house—Liability of father for injuries inflicted by it - - - - - **629**
See DOGS.

SCHOOLS—*Public Elementary School—Special Instruction — Cookery Centre — Compulsory Attendance — Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 7, *sub-s.* 4 ; *s.* 97.

The Board of Education's Code of Regulations for Public Elementary Schools for 1912 provides for annual parliamentary grants to be given for special instruction in certain specified subjects, including cookery, which may be taught at centres to scholars from more than one school.

The respondent's daughter, aged eleven years, who ordinarily attended a public elementary school at L., had been selected by the local education authority with other scholars from that school to receive special instruction in cookery and to attend a cookery centre at a school at F. which was within two and a half miles of the child's residence. On a day when, as the respondent knew, the child was required to attend the cookery centre at F. school, the respondent sent the child to L. school, where she was refused admittance. The respondent was charged with having on the day in question unlawfully neglected and omitted to cause his child to attend school contrary to a by-law of the local education authority :—

Held, that the attendance of the child at the F. school for the purpose of receiving instruction in cookery was compulsory, and that the respondent had committed a breach of the by-law. BUNT *v.* KENT - - **Div. Ct. 207**

—— Building operations—Hoardings for protection of passengers in street — Necessity for licence of borough council —Exemption of school buildings - **505**
See LONDON. 1.

SEAMAN—Persuading seaman to desert—Articles not signed—"His ship" **462**
See SHIPPING. 5.

—— Wages—Claim before Court of summary jurisdiction—"Order final"—Appeal—Special case - - - - - **616**
See SHIPPING. 6.

SECONDARY EVIDENCE.
See EVIDENCE.

SERVICE—Foreign corporation—Service of writ within jurisdiction — Carrying on business — Agent in England — No authority to contract - - - **715**
See PRACTICE. 1.

SETTLED ESTATE — Estate duty — Property passing on death—Person entitled in reversion—Presumed date of death—Aggregation - - - - **351**
See REVENUE. 1.

SHIPPING—*Bill of Lading—Exemptions from Liability—Fire caused by Unseaworthiness—Fire happening without actual Fault or Privity*

SHIPPING—*continued.*

—Shipowner's Liability — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship is not liable to make good any loss or damage happening without his actual fault or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

The plaintiffs shipped on the defendants' vessel certain goods for carriage from Tréport to London on the terms of a bill of lading which stated that the goods were to be delivered subject to the exceptions and conditions therein mentioned. Among the exceptions were the following :—

(1.) "Fire on board, in hulk or craft, or on shore, stranding and all accidents, loss and damage whatsoever, from defects in hull, tackle, apparatus, ... perils of the seas . . . . or from any act, neglect or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants, or agents of the owners . . . . in the management, loading, stowing . . . . or otherwise . . . ."

(11.) "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners . . . . of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage."

The defendants also took on board at Tréport certain cases of metallic sodium saturated with petrol. The sodium was insufficiently packed and stowed with insufficient care. The vessel started in rough weather ; the cases broke loose, and coming into contact with water caused a series of explosions and fire on board, as the result of which the ship went down and the plaintiffs' goods were lost.

In an action to recover damages for the loss of the goods the judge at the trial found that the ship was not seaworthy at the commencement of the voyage ; that the goods were lost by fire caused by the unseaworthiness without the actual fault or privity of the defendants within the meaning of s. 502 of the Merchant Shipping Act, 1894 ; but he held that the protection afforded by that section was excluded by the exceptions in the bill of lading, and that therefore the defendants were liable :—

Held, on appeal, that neither of the above exceptions in the bill of lading excluded the operation of s. 502 of the Merchant Shipping Act, 1894, and that therefore the defendants were entitled to rely upon the protection of that section, and were not liable for the loss.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229 distinguished.

Decision of Scrutton J. [1913] 1 K. B. 538 reversed. INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED **C. A. 541**

SHIPPING—*continued.*

2. —— *Charterparty—Lay Days—Sundays excluded—Despatch Money—"All time saved in loading"—Sunday included in Despatch Days.*

By the terms of a charterparty for a voyage the entire cargo, consisting of 5142 units, was to be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted). If the ship was longer detained demurrage was to be paid at a certain rate per running day. The charterparty contained this clause: "Owners agree to pay charterers 10*l.* (say ten pounds) per day for all time saved in loading":—

Held, that a Sunday was to be counted among despatch days although Sundays were excluded from lay days.

Laing v. *Hollway* (1878) 3 Q. B. D. 437, and *In re Royal Mail Steam Packet Co. and River Plate Steamship Co.* [1910] 1 K. B. 600, followed.

The Glendevon [1893] P. 269, and *Nelson & Sons* v. *Nelson Line, Liverpool* [1907] 2 K. B. 705, distinguished. MAWSON SHIPPING COMPANY, LIMITED *v.* BEYER

Bailhache J. 304

3. —— *Charterparty—Loss of Time—Cesser of Hire—"Damage preventing working of vessel"—"Accident to cargo"—Vessel driven into Port—"Such detention or loss of time"—Damage to Vessel by Shifting of Deck Cargo.*

A ship was chartered for a voyage at a certain sum per calendar month. The charterparty contained the following clause:—"In the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours . . . .; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The ship was loaded by the charterers with a cargo of lumber including a deck cargo. Soon after starting she encountered heavy weather; the deck cargo shifted and damaged the ship. She was taken into port; the cargo was discharged, and repairs were done to the ship. These repairs occupied nine days and twelve hours and were rendered necessary by the combined effect of stress of weather and the shifting of the deck cargo:—

Held, that the nine days and twelve hours were time lost from "damage preventing the working of the vessel" and were not "detention or loss of time" from the ship being "driven into port by stress of weather, or from accident to the cargo," within the meaning of the above clause, and that the ship was off hire for that period. BURRELL & SONS *v.* F. GREEN & Co. - - - **Bailhache J. 293**

4. —— *Fire—Fire caused by Unseaworthiness—"Actual fault or privity" of Owners—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . .":—

Held by Buckley and Hamilton L.JJ., that where the fire which destroyed the cargo was caused by the unseaworthiness of the ship, and the unseaworthiness itself was not without the fault or privity of the owners, the owners were not relieved by the section from liability for loss of the cargo by fire.

Held, also, by Buckley and Hamilton L.JJ. (Vaughan Williams L.J. dissenting), on the facts of the case, that the loss had happened with the actual fault or privity of the owners, inasmuch as the managing owner, who had knowledge of the defective condition of the vessel's boilers, failed to give special instructions to the captain and chief engineer regarding their supervision or to take any steps to prevent the vessel putting to sea with her boilers in an unseaworthy condition. ASIATIC PETROLEUM COMPANY, LIMITED *v.* LENNARD'S CARRYING COMPANY, LIMITED - **C. A. 419**

5. —— *Seaman—Persuading Seaman to desert—Articles not signed—"His ship"—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 236.

By s. 113 of the Merchant Shipping Act, 1894, the master of every ship, except as therein mentioned, shall enter into an agreement with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom. By s. 114 the agreement is to be in the form approved by the Board of Trade and is to be dated and signed as therein directed. By s. 236 of the Act, if a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, he shall be liable to a fine.

A seaman was engaged to serve as a seaman on a British ship. After he was so engaged, but before he had signed any agreement under s. 113 of the Act, a person attempted to persuade him to refuse to join the ship:—

Held, that the person could properly be convicted of attempting to persuade the seaman to refuse to join "his ship" although at the time of the attempt no agreement had been signed. VICKERSON *v.* CROWE

Div. Ct. 462

6. —— *Seaman—Wages—Claim before Court of Summary Jurisdiction—"Order final"—Appeal—Special Case—Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49). *s.* 32—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 164.

By s. 33, sub-s. 1, of the Summary Juris-

SHIPPING—*continued.*
diction Act, 1879, any person aggrieved who desires to question an order or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned.

By s. 164 of the Merchant Shipping Act, 1894, a seaman may, as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a Court of summary jurisdiction as therein described, and the order made by the Court in the matter shall be final :—

Held, that, notwithstanding the former enactment, no appeal by special case lies from an order made by a Court of summary jurisdiction under the latter.

Westminster Corporation v. *Gordon Hotels* [1908] A. C. 142 followed and applied.

Whether the Court of summary jurisdiction may not give its decision subject to a special case, *quære.* WILLS & SONS *v.* MCSHERRY **Div. Ct. 616**

SHOPS—*Weekly Half-Holiday—Exemptions*—"*Sale of motor cycle and aircraft supplies and accessories to travellers*" — *Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 4 ; *Sched. II.*

Sect. 4, sub-s. 2, and Sched. II. of the Shops Act, 1912, exempt from the obligation to close for a weekly half-holiday any shop in which the only trade or business carried on is that of "the sale of motor cycle and aircraft supplies and accessories to travellers."

The respondent, who carried on at a shop the business of a saddler and harness maker, but did not deal in or sell supplies and accessories to travellers by motor cycle or aircraft, claimed to come within the above exemption :—

Held, that the exemption applies only to the sale of supplies and accessories for motor cycles and aircraft to travellers, and therefore the respondent did not come within the exemption. WILLIAMS *v.* GOSDEN **Div. Ct. 35**

2. —— *Shop Assistant—Weekly Half-holiday—Employment in Afternoon about Business of Shop—Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 1.

By s. 1, sub-s. 1, of the Shops Act, 1912, "On at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

The appellant was the manager of a shop at B. belonging to a company which owned many similar shops in different parts of the country. The appellant employed his shop assistants, in consideration of extra remuneration, to distribute certain handbills in the neighbourhood during their spare time. The handbills consisted of an advertisement of the company's margarine but contained no mention of their particular shop at B. The assistants distributed the handbills to passers-by in the streets and at houses in the neighbourhood on the afternoon of the day of the week fixed

SHOPS—*continued.*
under the Shops Act, 1912, for the weekly half-holiday for that shop :—

Held, (1.) that to constitute a breach of the above section it was not necessary that the handbills should specially refer to the shop at B., and that the assistants in distributing them were not the less employed about the business of that shop because they were thereby also advertising the business of the company's other shops ; (2.) that an employment of the assistants to do the work in their spare time generally included an employment to do it on the half-holiday afternoon which was their principal spare time. GEORGE *v.* JAMES **Div. Ct. 378**

SOUTH WALES DISTRICT RULES—Coal Mines (Minimum Wage) Act, 1912 - - **674**
See MINE.

SPECIAL CASE — Seaman — Wages — Appeal—Summary jurisdiction—"Order final" *See* SHIPPING. 6. **616**

STAMP—Sale of forged stamps—Stamps cancelled before sale - - - - **144**
See CRIMINAL LAW. 2.

STAMP DUTIES MANAGEMENT ACT, 1891 s. 13 - - - - - - **144**
See CRIMINAL LAW. 2.

STATE A CASE—Power to—Income tax—Assessment of profits under Schedule D.—Deprivation of profits on which computation made—Application to Commissioners for relief—Appeal - - **709**
See REVENUE. 2.

—— Power to — Income tax — Assessment—Appeal - - - - - - **709**
See REVENUE. 3.

STATUTE—Construction—Evidence — Admissibility - - - - - - **641**
See REVENUE. 9.

STATUTES :—

1828.

9 Geo. 4, c. 61, s. 14—*Alehouse* - - **468**
See LICENSING ACTS. 2.

1835.

5 & 6 Will. 4, c. 41, ss. 1, 2—*Gaming* - **118**
See GAMING.

1836.

6 & 7 Will. 4, c. 37, s. 15—*Bread* - - **608**
See CROWN OFFICE.

1842.

5 & 6 Vict. c. 35, s. 100—*Income Tax* - **357**
See REVENUE. 3.

—— —— s. 134 - - - - - **709**
See REVENUE. 2.

1847.

10 & 11 Vict. c. 14, s. 13—*Markets and Fairs Clauses* - - - - - - **38**
See MARKET.

STATUTES—*continued.*

1853.

16 & 17 Vict. c. 34, s. 2—*Income Tax* - 357
See REVENUE. 3.

1855.

18 & 19 Vict. c. 120, ss. 121, 122, 123—*Metropolis Management* - - 505
See LONDON. 1.

1857.

20 & 21 Vict. c. 43, s. 2—*Summary Jurisdiction*
See JUSTICES. 2. 109

1863.

26 & 27 Vict. c. 112, s. 12—*Telegraph* - 564
See TELEGRAPH.

1867.

30 & 31 Vict. c. 102, s. 7—*Representation of the People* - - - - - - 369
See LONDON. 2.

1869.

32 & 33 Vict. c. 41, ss. 3, 4—*Poor Rate Assessment and Collection* - - - 369
See LONDON. 2.

1870.

33 & 34 Vict. c. 52, ss. 2, 10—*Extradition* 77
See EXTRADITION.

33 & 34 Vict. c. 75, s. 7, sub-s. 4; s. 97—*Education* - - - - - - 207
See SCHOOLS.

1872.

35 & 36 Vict. c. 65, s. 4—*Bastardy Laws Amendment* - - - - - - 1
See BASTARDY.

1874.

37 & 38 Vict. c. 49, s. 15—*Licensing* - 468
See LICENSING ACTS. 2.

1879.

42 & 43 Vict. c. 49, s. 33—*Summary Jurisdiction* - - - - - - 109
See JUSTICES. 2.
See SHIPPING. 6. 616

1880.

43 & 44 Vict. c. 19, s. 16 (*e*)—*Taxes Management*
See REVENUE. 4. 632

—— —— s. 59 - - - - - - 709
See REVENUE. 2.

—— —— s. 86 - - - - - - 288
See DISTRESS.

1881.

44 & 45 Vict. c. 62, s. 17, sub-s. 1—*Veterinary Surgeons* - - - - - - 92
See VETERINARY SURGEON.

1882.

45 & 46 Vict. c. 43, s. 12—*Bills of Sale* - 147
See BILL OF SALE.

STATUTES—*continued.*

1885.

48 & 49 Vict. c. 69, s. 5—*Criminal Law Amendment* - - - - - - 414
See CRIMINAL LAW. 3.

1887.

50 & 51 Vict. c. 15, s. 4—*Customs and Inland Revenue* - - - - - - 313
See REVENUE. 10.

50 & 51 Vict. c. 28, ss. 2, 3—*Merchandise Marks*
See MERCHANDISE MARKS. 57

1891.

54 & 55 Vict. c. 38, s. 13—*Stamp Duties Management* - - - - - - 144
See CRIMINAL LAW. 2.

1893.

56 & 57 Vict. c. 71, s. 25, sub-s. 2—*Sale of Goods* - - - - - - - 244
See SALE OF GOODS.

1894.

57 & 58 Vict. c. 30, s. 1; s. 5, sub-s. 3—*Finance*
See REVENUE. 1. 351

57 & 58 Vict. c. 60, ss. 113, 236—*Merchant Shipping* - - - - - - 462
See SHIPPING. 5.

—— —— s. 164 - - - - - - 616
See SHIPPING. 6.

—— —— s. 502 - - - - - - 541
See SHIPPING. 1.
See SHIPPING. 4. 419

1896.

59 & 60 Vict. c. 36, s. 5—*Locomotives on Highways*—Regulations, dated July 31, 1907, made under this section - - 258
See MOTOR CAR. 1.

59 & 60 Vict. c. 51, s. 1—*Vexatious Actions*
See VEXATIOUS ACTIONS. 122

1899.

62 & 63 Vict. c. 51, s. 19, sub-s. 2; s. 20, sub-s. 6—*Sale of Food and Drugs* 270
See ADULTERATION.

1900.

63 Vict. c. 7, s. 12, sub-s. 2—*Finance* - 351
See REVENUE. 1.

1901.

1 Edw. 7, c. 22, ss. 32, 33, 128—*Factory and Workshop* - - - - - - 105
See FACTORY ACTS.

1902.

2 Edw. 7, c. clxxiii., Part IX.—*London County Council (General Powers)* - - 490
See LODGING-HOUSES.

1904.

4 Edw. 7, c. 7, s. 3, sub-s. 2—*Finance* - 313
See REVENUE. 10.

STATUTES—*continued.*

1906.

6 Edw. 7, c. 41, s. 30; Sched. I., r. 12—*Marine Insurance* - - - - - - 442
See INSURANCE (MARINE).

1907.

7 Edw. 7, c. clxxi., ss. 8, 25—*Metropolitan Water Board (Charges)* - - 221
See WATER.

1908.

8 Edw. 7, c. 67, s. 12, sub-s. 1—*Children* 217
See INFANT.

—— —— s. 17 - - - - - - 137
See CRIMINAL LAW. 1.

8 Edw. 7, c. 68, s. 13—*Port of London* - 5
See DOCKS. 1.

—— —— ss. 13, 15 - - - - - 14
See DOCKS. 2.

1909.

9 Edw. 7, c. 30, ss. 2, 5, 6—*Cinematograph*
See JUSTICES. 2. 109

9 Edw. 7, c. 44, ss. 17, 39—*Housing, Town Planning, &c.* - - - - - 160
See LOCAL GOVERNMENT BOARD.

1910.

10 Edw. 7, c. 8, ss. 1, 2, 25—*Finance* (1909-10) - - - - - - 528
See REVENUE. 7.

—— —— s. 13 - - - - - - 641
See REVENUE. 9.

—— —— s. 17, sub-s. 5 - - - - 515
See REVENUE. 11.

—— —— ss. 19, 33, 41 - - - - 327
See REVENUE. 13.

—— —— ss. 20, 24 - - - - - 87
See REVENUE. 8.

—— —— s. 25 - - - - - - 339
See REVENUE. 6.

—— —— ss. 66, 72 - - - - - 579
See REVENUE. 5.

10 Edw. 7 & 1 Geo. 5, c. 24, ss. 21, 23; Sched. II., Part I.—*Licensing (Consolidation)* - - - - - - 468
See LICENSING ACTS. 2.

—— —— s. 62, sub-s. 1 - - - 26
See LICENSING ACTS. 1.

10 Edw. 7 & 1 Geo. 5, c. 25, s. 1—*Children Act* (1908) *Amendment* - - - 137
See CRIMINAL LAW. 1.

10 Edw. 7 & 1 Geo. 5, c. c., Schedule, s. 9—*Port of London (Port Rates on Goods) Provisional Order* - - - 5, 14
See DOCKS. 1, 2.

1911.

1 & 2 Geo. 5, c. 32, s. 3—*Education (Administrative Provisions)* - - - 505
See LONDON. 1.

STATUTES—*continued.*

1 & 2 Geo. 5, c. 46, ss. 1, 2, 19, 24—*Copyright* - - - - - - - 395
See COPYRIGHT. 2.

—— —— ss. 1, 5, 8 - - - - - 622
See COPYRIGHT. 1.

1 & 2 Geo. 5, c. 50, s. 74; s. 103, sub-s. 2—*Coal Mines* - - - - - - 66
See CERTIORARI.

1 & 2 Geo. 5, c. 52, s. 1, sub-s. 1—*Rag Flock*
See RAG FLOCK. 253

1912.

2 Geo. 5, c. 2—*Coal Mines (Minimum Wage)*
See MINE. 674

2 Geo. 5, c. 3, s. 1—*Shops* - - - 278
See SHOPS. 2.

—— —— s. 4; Sched. II. - - - - 35
See SHOPS. 1.

STIPENDIARY MAGISTRATE—Court consisting of stipendiary magistrate and another justice of the peace—Magistrates differing in opinion—Stipendiary magistrate adjudicating alone — Acquiescence by second magistrate - - - - 32
See JUSTICES. 1.

"**STOREHOUSE**" — Motor car — Building in which petroleum spirit for the purposes of light locomotives is kept—User of building as dwelling - - - 258
See MOTOR CAR. 1.

SUMMARY JURISDICTION—Justices.
See JURISDICTION.

SUNDAY—Shipping—Charterparty—Lay days—Sundays excluded—Despatch money—"All time saved in loading"—Sunday included in despatch days - - 304
See SHIPPING. 2.

SUPER-TAX — Income tax—Assessment under Sched. D for previous year not conclusive for purposes of super-tax - 579
See REVENUE. 6.

SURCHARGE—London—Rates—Parliamentary borough—Surcharge by auditor - 369
See LONDON. 2.

SURGEON—Veterinary surgeon.
See under VETERINARY SURGEON.

TAXES—Inland Revenue.
See under REVENUE.

TAXES MANAGEMENT ACT, 1880, s. 59 - 152
See REVENUE. 2.

TELEGRAPH—*Placing Posts and Wires in or across Street or Public Road—Consenting Body "having the control of such street or public road"—Highway not repairable by Inhabitants at large—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *s.* 12.

By s. 12 of the Telegraph Act, 1863, "the

TELEGRAPH—*continued.*
company" (now the Postmaster - General) "shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road."

The Postmaster-General, being desirous of placing telegraph posts and wires in, along, and across a street or public road in an urban district, being a public highway not repairable by the inhabitants at large, required the urban district council to give their consent thereto under s. 12 of the Telegraph Act, 1863. It was admitted that the highway was a "street" which the urban district council could require the frontagers to make good under s. 150 of the Public Health Act, 1875 :—

Held (affirming the decision of the Railway and Canal Commissioners [1913] 3 K. B. 451), that the urban district council, not being liable to repair the road, were not the body "having the control of" it within the meaning of s. 12 ; and that streets which have not been taken over by the local authority remain under the control of the owners of the soil over which they are made. POSTMASTER-GENERAL *v.* HENDON URBAN DISTRICT COUNCIL **C. A. 564**

TIME POLICY—"Perils of the sea"—Institute Time Clauses—"Inchmaree" Clause *See* INSURANCE (MARINE). **442**

TOBACCO—Manufacturer of tobacco—Possession of tobacco which on being dried at temperature of 212 deg. Fahr. decreases in weight by more than 32 per cent.—Offence - - - - - - **313** *See* REVENUE. 10.

TOLL—Market. *See* under MARKET.

TRADE—Distress—Implement of trade - **288** *See* DISTRESS.

—— Merchandise marks. *See* under MERCHANDISE MARKS.

TRANSFER—Licensing Acts – Compensation levy—"Old on licence"—Forfeiture—Grant to assignee at special sessions—"Transfer" - - - - - - **468** *See* LICENSING ACTS. 2.

TRANSLATION—From foreign language—Copyright—Literary work—Author—Advertisement - - - - - - **622** *See* COPYRIGHT. 1.

TRIAL—Jury, Trial by—General verdict—Further question asked by judge or jury—Judgment entered in accordance with answer - - - - - - **512** *See* PRACTICE. 3.

—— Postponement of—County court—Practice—"Good cause"—Pendency of action in High Court raising similar issue **241** *See* COUNTY COURT.

UNDEVELOPED LAND DUTY — Agricultural land—Lease made before April 30, 1909—Power to determine tenancy for certain purposes—Conditional power **515** *See* REVENUE. 11.

UNSEAWORTHINESS—Ship—Fire caused by unseaworthiness—"Actual fault or privity" of owners - - - **419** *See* SHIPPING. 4.

VETERINARY SURGEON—*Qualified Person—Use of Description by Unqualified Person stating Special Qualification—Description of Premises where Business is carried on—"Canine Surgery"—Veterinary Surgeons Act*, 1881 (44 & 45 *Vict. c.* 62), *s.* 17, *sub-s.* 1.

By the Veterinary Surgeons Act, 1881, s. 17, sub-s. 1, any person not possessing the prescribed qualification who after December 31, 1883, "takes or uses any name, title, addition, or description, stating that he is a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

The respondent, who was not possessed of the qualifications specified by the section, exhibited over the entrance door to his residence a lamp on which was inscribed "A. E. Kennard, Canine Surgery," and on the wall of the premises a brass plate bearing the inscription "Canine Surgery. A. E. Kennard" :—

Held, that these words did not constitute a description stating that the respondent was specially qualified to practise a branch of veterinary surgery, and that he was not liable to a fine under the section. ROYAL COLLEGE OF VETERINARY SURGEONS *v.* KENNARD **Div. Ct. 92**

VEXATIOUS ACTIONS—*Practice—Order that no Legal Proceedings be instituted without Leave of High Court—Criminal Proceedings—Vexatious Actions Act*, 1896 (59 & 60 *Vict. c.* 51), *s.* 1.

By s. 1 of the Vexatious Actions Act, 1896, it is provided that: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, ... the Court may . . . . order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding."

Upon the application of the Attorney-General a Divisional Court made an order under the above section that no legal proceedings should be instituted by B. in the High Court or in any other Court unless he obtained the leave of the High Court or some judge thereof and satisfied the Court or judge that the legal proceeding was not an abuse of

VEXATIOUS ACTIONS—*continued.*
the process of the Court and that there was a prima facie ground for the proceeding :—

Held by Darling and Lush JJ. (Bankes J. dissenting), that the words "legal proceedings" in the section do not include criminal proceedings and that therefore the order of the Divisional Court was no bar to an application to a magistrate for a summons by B. upon an information sworn by him, nor to the presentment of an indictment by B. to a grand jury in respect of certain misdemeanours, without the leave of the High Court or a judge thereof.

Per Lush J. (Bankes J. dissenting): A person who applies upon an information to a magistrate for a summons, or who presents a bill of indictment to a grand jury, does not institute legal proceedings within the meaning of the Act. *In re* VEXATIOUS ACTIONS ACT, 1896. *In re* BERNARD BOALER
Div. Ct. 122

WAGES—Coal mine—South Wales District Rules—Coal Mine (Minimum Wage) Act, 1912 - - - - - - - 674
See MINE.

—— Seaman—Claim before Court of summary jurisdiction—"Order final"—Appeal—Special case - - - - - - 616
See SHIPPING. 6.

WARRANT—False imprisonment—Defence to action for—Arrest without warrant—Felony - - - - - - - 595
See FALSE IMPRISONMENT.

WARRANTY—False—Sale of food and drugs—Adulteration - - - - - 270
See ADULTERATION.

WATER—*Supply—London—"Domestic Purposes"—Public-house—Catering Business—Metropolitan Water Board (Charges) Act*, 1907 (*7 Edw. 7, c. clxxi.*), *ss.* 8, 25.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service pipe of the Water Board is laid or of any person who under the provisions of the Act is entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person a supply for domestic purposes at a rate per cent. upon the rateable value of the house or building. By s. 25 the expression "domestic purposes" shall not include a supply for any of the following purposes (inter alia), "any trade, manufacture, or business."

The defendant was the occupier and licensee of a public-house within the district of the Metropolitan Water Board, which was supplied with water in the ordinary way by supply pipes from the Water Board's mains. The water so supplied was charged for as a supply for domestic purposes by a rate of 5 per cent. upon the rateable value of the house. The defendant carried on in the house, in addition to the ordinary business of a public-house, a catering business for persons who came there to lunch but who did not reside there. Luncheons were served there every day, which involved an increased use of water for such purposes as cooking and washing up plates and dishes. The Water Board claimed to be entitled to make a small extra charge for the water so used, in addition to the charge of 5 per cent. upon the rateable value of the house, upon the ground that the water was used for other than "domestic purposes" :—

Held, that, as the use of the water was in its nature domestic, the supply was for "domestic purposes" within the meaning of s. 25, and the fact that the existence of the business necessitated an increased supply for domestic purposes did not make it a supply for the purposes of the business ; and that therefore the Water Board were not entitled to make the extra charge.

Decision of the Divisional Court [1913] 2 K. B. 257 affirmed. METROPOLITAN WATER BOARD *v.* AVERY - - - - C. A. 221

WAY-LEAVE—Mineral rights duty—Mineral way-leave—Way-leave over lessor's land for minerals not got from demised mines
See REVENUE. 8. 87

WORDS—"Canine Surgery" - - - 92
See VETERINARY SURGEON.

—— "Domestic purposes" - - - 221
See WATER.

—— "Good cause" - - - - - 241
See COUNTY COURT.

—— "Holder" - - - - - - 118
See GAMING.

—— "Indorsee" - - - - - 118
See GAMING.

—— "Nominal rent" - - - - 641
See REVENUE. 9.

—— "Order final" - - - - - 616
See SHIPPING. 6.

—— "Rags" - - - - - - - 253
See RAG FLOCK.

—— "Sell" - - - - - - - 38
See MARKET.

—— "Storehouse" - - - - - 258
See MOTOR CAR. 1.

—— "Transfer" - - - - - 468
See LICENSING ACTS. 2.

WORKSHOP (FACTORY AND).
See under FACTORY ACTS.

WRIT—Foreign corporation—Service of writ within jurisdiction—Carrying on business—Agent in England—No authority to contract - - - 715
See PRACTICE. 1.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

UL 3 1 MAR 1978